CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 173

JACK WALKER, PETITIONER,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 22, 1940.

CERTIORARI GRANTED OCTOBER 28, 1940.

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SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 22969-R

JACK WALKER, Petitioner,

vs.

JAMES A. JOHNSTON, Warden, U. S. Penitentiary, Alcatraz, California, Respondent

AFFIDAVIT IN FORMA PAUPERIS

Comes now Jack Walker, who first upon being sworn, deposes and says, to wit:

That he is a citizen of the United States by birth and of legal age and that he is in the custody of the United States and is being confined in the U. S. Penitentiary on the Island of Alcatraz in the State of California and that he prays to file a petition for a writ of habeas corpus to test the legality of his imprisonment and detention, but that he is without funds and unable to pay the cost of the filing of the said petition for the writ of habeas corpus or to give bond in lieu thereof and that he further states that he verily believes he is lawfully entitled to the redress he seeks herein and that the petition is meritorious and brought forth in good faith.

Wherefore, Jack Walker, now prays the Honorable District Court of the United States at San Francisco, for the permission to file and to proceed to prosecute the said petition for the writ of habeas corpus in this Honorable Court without cost or fee and in Forma Pauperis.

Jack Walker, Petitioner.

(Verification.)

[fol. 2]

ORDER

Upon reading the foregoing affidavit, and upon good cause appearing therefore:

It is hereby ordered, that the aforesaid Jack Walker be, and is, permitted and allowed to file his petition for a writ

of habeas corpus in this Court and to prosecute the same without the payment of Court costs and filing fees.

A. F. St. Sure, Hon. United States District Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 28, 1939

Petition for the writ of habeas corpus to the Honorable Judge of the U. S. District Court to Command the above-named respondent to grant the petitioner herein his Constitutional rights as guaranteed by the Constitution of the United States and as prayed for by said petitioner or show good and sufficient cause in the adverse thereof.

Comes now Jack Walker, the Petitioner, in the above-entitled cause and respectfully shows to this Honorable Court that he is being unlawfully restrained of his liberty by being imprisoned in the U. S. Penitentiary and in the custody of James A. Johnston, Warden at Alcatraz Island, California, that said petitioner and said respondent are within the lawful jurisdiction of this Honorable Court.

The petitioner prays to state and to further show with certain exhibits, to wit:

That on the 9th day of March, 1936 in the District Court of the United States, for the Northern District of Texas, a certain Grand Jury returned 'A True Bill'. The true bill being an indictment charging violation of Title 12 U. S. C. A. Section 588b and the said statute, etc., being a lawful statute of the United States, and of which said certified copy of indictment in the petitioner's cause is attached hereto and made a part hereof and marked as "Exhibit A".

[fol. 4] "That on the 28th day of April 1936, this case and cause as set forth herein Exhibit 'A' and styled case No. 632—Criminal come for trial and come the United States by her attorney, come also Jack Walker the petitioner herein in person and without legal counsel, and after the said Jack Walker entered a plea of 'Guilty' and the jury having heard the said plea and having heard the testimony of witnesses and the Charge of the Court, returned the following verdict: We find the petitioner guilty, and which record of

said trial and conviction is attached hereto and made a part hereof and marked as Exhibit "B". What on the 1st day of May, 1936, the aforesaid United States Court having received the aforesaid verdict as set forth herein in Exhibit "B" approved same, and it ordered and adjudged his punishment to be an imposition of twelve (12) years in the U. S. Penitentiary at Leavenworth, Kansas, and which record of sentence is attached hereto and made a part hereof and marked as Exhibit 'C' ".

"That on the 4th day of May, 1936, the petitioner herein was committed to the U. S. Penitentiary at Leavenworth, Kansas, all of which said record of commitment is attached hereto and made a part hereof and marked as Exhibit "D".

"That on the 6th day of March, 1939 an affidavit certifying the foregoing records, to wit: Indictment, Judgment, Sentence and commitment, are true copies of the records in cause No. 632-Cr., styled—the United States vs. Jack Walker. Which record of affidavit and oath is attached hereto and made a part hereof and marked as Exhibit "E".

The petitioner further respectfully shows that his detention and imprisonment are illegal and unlawful for the following reasons:

[fol. 5] First—Because he was deprived of his liberty without having the assistance of counsel, because he did not waive his lawful right for counsel, because on the 23rd day of May, 1938, the Supreme Court ruled in the Case of Johnson vs. Zerbst U. S. 58 S. Ct. 1019, that under the Sixth Amendment to the Constitution of the United States, a Federal Court has no power of authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel, see also Brest v. Johnston, No. 22862-L.

Second—Because the trial Court did not ask the petitioner herein if he wanted counsel, or instruct him that he was entitled to counsel. The petitioner herein did not know that he was entitled to counsel unless he had the money to pay for counsel, to that effect, and therefore he could not and did not competently waive his constitutional rights for counsel. In the case of Johnson vs. Zerbst herein mentioned, the Supreme Court held that if the accused is not represented by counsel and has not competently and intelligently waived his constitutional right, the jurisdiction of the court is lost, the judgment of conviction pronounced by

the court is void and release from imprisonment may be obtained by habeas corpus.

Third—Because according to the opinion of the Supreme Court cited herein in the aforesaid case John- vs. Zerbst, the petitioner's proper remedy is by writ of habeas corpus.

Wherefore: Jack Walker the petitioner herein prays this Honorable Court for redress and relief and further prays [fol. 6] this Honorable Court that a writ of habeas corpus issue out from under the seal of this Honorable Court Commanding the said James A. Johnston, Respondent to produce the body and person of the said petitioner before this Honorable Court, so that he may be released from further unlawful Custody as prayed for herein, or show good and sufficient cause why this petition for writ of habeas corpus should not issue and the petitioner further prays for such other relief in the premises as Law and Justice require and your petitioner shall pray.

Submitted this 25 day of March 1939.

Jack Walker, Petitioner.

(Verification.)

[fol. 7] (Here follows exhibits A Indictment; B Judgment; C Sentence and D. Commitment. The same being duplicates of exhibits attached to the Return to Order to Show Cause.)

[fol. 8] EXHIBIT "E" TO PETITION

DISTRICT COURT OF THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF TEXAS

I, Geo. W. Parker, Clerk of the District Court of the United States in and for the Northern District of Texas, do hereby certify the foregoing to be a true and correct copy of the

1st: Indictment;

2nd: Judgment;

3rd: Sentence;

4th: Commitment, together with the Marshal's Return thereon, in cause No. 632-Criminal, entitled The United

States of America, Plaintiff against Jack Walker and Charles Franklin White, with respective aliases, Defendants as fully as the same remains on file and of record in said cause, in my office at San Angelo, Texas.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Court, at my office in the city of San Angelo, Texas, in said District, this 6th day of March in the year of our Lord one thousand nine hundred and thirty-nine and of American Independence the 163rd year.

George W. Parker, Clerk of said Court. By Jesse T. Couch, Deputy.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—Filed March 28, 1939

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that James A. Johnston, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 24th day of April, 1939, at the hour of 10 o'clock A. M., of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: March 28, 1939.

Michael J. Roche, United States District Judge.

(Admission of service.)

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

RETURN TO ORDER TO SHOW CAUSE—Filed May 15, 1939

Now comes James A. Johnston, Warden of the United States Penitentiary at Alcatraz Island, California, and for

cause why a Writ of Habeas Corpus should not issue herein, shows as follows:

I

That the person hereinafter called "the prisoner" on whose behalf the petition for Writ of Habeas Corpus was filed, is detained by your respondent James A. Johnston as Warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the Judgment and Sentence, and Order and Warrant of Commitment duly and regularly issued in Criminal Cause number 632 on the 1st day of May, 1936, by District Judge William Hawley Atwell of the United States District Court for the Northern District of Texas, and Transfer Order issued at Washington, D. C., by Sanford Bates, Director of the Bureau of Prisons of the Department of Justice, dated January 16, 1936.

II

That filed herewith and incorporated herein as though fully set forth and as Respondent's Exhibit "A" are the following:

1. Certified copy of Indictment, Minute Entries, Sentence and Commitment, and Docket Entries in said Crimnal Cause number 632;

2. Transfer Order issued by the Director of the Bureau of Prisons as aforesaid:

3. Record of Court Commitment of United States Penitentiary at Alcatraz, California, pertaining to Jack Walker;

[fol. 11] 4. Affidavit of United States Attorney Clyde O. Eastus;

5. Affidavit of Assistant United States Attorney Joe H. Jones;

6. Affidavit of Elmer J. Reed, United States Probation Officer.

Wherefore, respondent prays that the Petition for Writ of Habeas Corpus be dismissed.

Dated: This 15th day of May, 1939.

James A. Johnston, Warden of the United States Penitenary at Alcatraz Island, California.

[fol. 12] RESPONDENT'S EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

INDICTMENT

At a special term of the District Court of the United States for the Northern District of Texas, begun and holden on the 9th day of March, A. D. 1936, within and for the Fort Worth Division of the Northern District of Texas at Fort Worth, Texas, the Grand Jurors for the United States of America selected, tried, empaneled, sworn and charged to inquire into and true presentment make of all offenses under the laws of the said United States committed within said District, upon their oaths present in open court and charge:

That heretofore, to wit, on or about the first day of July, A. D. 1935, L. T. Youngblood, J. T. Harmon and Mrs. Carrie G. Williams were officers, to wit, president, vice-president and cashier, respectively, of the First National Bank, Bronte, Texas, which said First National Bank of Bronte, Texas, was an association formed under the laws of the United States of America for carrying on the business of banking at Bronte, Texas, and was then and there a member bank, as defined in the Act of Congress of December 23, 1913, known as the Federal Reserve Act, of the Federal Reserve Bank of Dallas, and each and all of said officers of the said bank, as such officers, had the custody, direction, and control of the moneys, funds and credits of the said bank, and on or about the first day of July, A. D. 1935, in Bronte, Texas, Coke County, in the San Angelo Division of the Northern District of Texas and within the jurisdiction of this court, Jack Walker, alias Joe C. White, alias Jack Miller; and Charles Franklin White, alias Charles White, alias Charles F. White, alias [fol. 13] Charlie White, whose more true, full and correct names are to the Grand Jurors unknown, hereinafter called defendants, did then and there by force and violence and by putting in fear, feloniously take from the custody and possession of the said L. T. Youngblood, J. T. Harmon and Mrs. Carrie G. Williams, officers of said bank as aforesaid, a large sum of money, to wit, approximately five hundred dollars in currency, a better description of the

said money being to the Grand Jurors unknown, the said money, to wit, approximately five hundred dollars in currency, lawful money of the United States of America, then and there belonging to and being in the care, custody, control, management and possession of the said member bank as aforesaid.

All of which acts of the said defendants were contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Second Count

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further present in open court and charge:

That heretofore, to wit, on or about the first day of July, A. D. 1935, L. T. Youngblood, J. T. Harmon, and Mrs. Carrie G. Williams, officers of the First National Bank, Bronte, Texas, and the said bank was a member bank and had the status as set forth in the first count of this indictment, the allegations concerning which and the relations of the officers of the said bank, as set forth in the first count of this indictment, being incorporation by reference into this count as though fully and affirmatively set forth herein and the said L. T. Youngblood, J. T. Harmon [fol. 14] and Mrs. Carrie G. Williams, as such officers, had the custody, direction and control of the moneys, funds and credits of the said bank;

That on the said date, in Bronte, Coke County, Texas, in the San Angelo Division of the Northern District of Texas and within the jurisdiction of this Court, Jack Walker and Charles Franklin White, with their respective aliases, as set forth in the first count of this indictment, reference to which is here made in this count, whose more true, full and correct names are to the Grand Jurors unknown, hereinafter called defendants, did then and there wilfully, knowingly, unlawfully and feloniously, by the use of a dangerous weapon, to wit, a sawed-off shot-gun, the same being a firearm, in committing the offense described in the first count of this indictment, the description of which offense is incorporated in this count by reference as fully as it set forth herein in detail, put in jeopardy the lives of the said L. T. Youngblood, J. T. Harmon and the said Carrie G. Williams, they, and each of them, being officers of the said

bank aforesaid, while they were in charge of the moneys, funds and credits of said bank.

All of which acts of the said defendants were contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

A True Bill:

W. W. Arterbury, Foreman of the Grand Jury. Clyde O. Eastus, United States Attorney. Joe H. Jones, Assistant United States Attorney.

Said indictment is endorsed as follows:

"No. 632. United States District Court, Northern District of Texas, Fort Worth Division. The United States of [fol. 15] America vs. Jack Walker and Charles Franklin White, with respective aliases. Indictment. Violation of Section 588-b, Title 12, United States Code Annotated. A true bill, W. W. Arterbury, Foreman. Filed in open Court this Apr. 14, 1936, Geo. W. Parker, Clerk, by G. B. Buckley, Deputy. No. 632, Filed 16 day of Apr., 1936, Geo. W. Parker, Clerk, by Jesse T. Couch, Deputy.

[fol. 16] In United States District Court, Northern District of Texas

No. 632—Criminal

Charge: Violating Section 588-b Title 12, United States Code Annotated

The United States of America

vs.

Jack Walker alias Joe C. White, alias Jack Miller, and Charles Franklin White, alias Charles White, alias Charles F. White, alias Charlie White

Minutes of Trial

On the 28th day of April, A. D. 1936, this cause was regularly called for trial and came the United States by Clyde O. Eastus, United States District Attorney, came also the defendants Jack Walker, alias Joe C. White alias Jack Mil-

ler and Charles Franklin White alias Charles White alias Charles F. White alias Charlie White in person, and both parties announced ready for trial; thereupon came a jury of twelve good and lawful men, to wit: J. L. Holland, E. L. Bailey, E. M. Hennersdorf, C. C. Miles, Earl Chapmond, Orzo Eubanks, Tommy Quick, J. B. Hemphill, Earl Reasoner, I. M. Cumbie, J. M. Findlater, A. L. Reynolds, who were duly and legally selected, impaneled and sworn to try this cause, and the Indictment herein being read the said defendant Jack Walker, alias Joe C. White alias Jack Miller entered thereto a plea of "guilty"; and the defendant Charles Franklin White alias Charles White alias Charles F. White alias Charlie White entered thereto a plea of "not guilty", and the jury having heard the Indictment read and the pleas entered thereto by each of said defendants, the evidence introduced, argument of counsel and charge of court, returned into open court the following verdict, to wit:

"We, the jury, find the defendant Jack Walker guilty as charged in the indictment and as plead by him. We further find the defendant Charles Franklin White guilty.

J. Mart Findlater, Foreman.

[fol. 17] And the Court having received said verdict approves same and orders that it be filed and entered. It is further ordered that the defendants and each of them be committed to the custody of the Marshal to await their sentence herein.

[fol. 18] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS

No. 632—Criminal

Charge: Violating Sec. 588-b, Title 12, U. S. C. Annotated

THE UNITED STATES OF AMERICA

vs.

JACK WALKER Alias Joe C. White, Alias Jack Miller

MINUTES OF SENTENCE

On this the 1st day of May, A. D. 1936, the Marshal produced in open court the said Jack Walker alias Joe C. White

alias Jack Miller to receive his sentence herein, and the said Jack Walker alias Joe C. White alias Jack Miller being asked by the court if he had anything to say why the sentence of the law should not be pronounced upon him at this time here now says nothing in bar. And the Court being of the opinion that the said Jack Walker alias Joe C. White alias Jack Miller is guilty of the offense of violating Section 588-b, Title 12, U. S. C. Annotated, as charged in the Indictment and as plead by him, it is ordered and adjudged that his punishment be and it is hereby fixed at imprisonment in the United States Penitentiary at Leavenworth, Kansas, for a term and period of twelve (12) years. And the Marshal of this district is directed seasonably to transport and convey the said Jack Walker alias Joe C. White alias Jack Miller from the City of San Angelo, Texas, to the City of Leavenworth, Kansas, and there deliver him to the proper officer of the United States Penitentiary to be therein imprisoned until the term of imprisonment herein fixed is fully ended, or until he is otherwise discharged according to law.

[fol. 19] DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF TEXAS

COMMITMENT

The President of the United States of America To the Marshal of the Northern District of Texas—Greeting:

Whereas, by the judgment of the Honorable, the District Court of the United States, for the Northern District of Texas, holding session at San Angelo, Texas made and entered on the 1 day of May A. D. 1936, in the case then pending therein, numbered 632-Criminal, and entitled "The United States vs. Jack Walker alias Joe C. White alias Jack Miller, the said Jack Walker alias Joe C. White alias Jack Miller Defendant, was adjudged to be imprisoned in the United States Penitentiary at Leavenworth, Kansas for a term and period of Twelve (12) years.

Charge: Violating Section 588-b, Title 12, United States Code Annotated.

Wherefore, you are hereby commanded that you execute the judgment of the said Court as therein required of you, and as you are bound to do.

Herein fail not, and what you shall have done make due return.

Witness, the Honorable Wm. H. Atwell, Judge of the District Court of the United States for the Northern District of Texas and the seal of the District Court of the United States, for the Northern District of Texas, at San Angelo, Texas this 1 day of May, A. D. 1936.

Geo. W. Parker, Clerk, U. S. District Court, Northern District of Texas, By Ramelle Paul, Deputy.
(Seal.)

Endorsed: "No. 632-Criminal. United States District Court Northern District of Texas. The United States vs. [fol. 20] Jack Walker alias Joe C. White alias Jack Miller. Commitment. For Jack Walker alias Joe C. White alias Jack Miller. 12 years in U. S. Penitentiary at Leavenworth, Kansas. Issued 1 day of May A. D. 1936. Geo. W. Parker, Clerk, By Ramelle Paul, Deputy. Returned and filed May 9, 1936. Geo. W. Parker Clerk by Jesse T. Crouch Deputy.

MARSHAL'S RETURN

Received this Committment at San Angelo, Texas, on the 1st day of May, 1936, and executed same on the 4th day of May, 1936, by delivering the body of the within named Jack Walker, together with a true copy of this writ, to the Warden of the United States Penitentiary at Leavenworth, Kansas, as herein commanded.

J. R. Wright, United States Marshal, by C. S. Brown, Deputy.

[fol. 21] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS

DOCKET ENTRIES BY THE COURT

No. 632

THE UNITED STATES OF AMERICA

vs.

JACK WALKER, and CHARLES FRANKLIN WHITE (with aliases)

Charge: Bank robbery.
Date and Plea: April 28.

Jack Walker—guilty.
Charles Franklin White—Not guilty.
Date and Sentence: April 28. Verdict of guilty as to both defendants.
Jack Walker—12 years.
Charles Franklin White, 12 years, Leavenworth Pen.

[fol. 22] Docket 632

THE UNITED STATES

vs.

JACK WALKER and CHARLES FRANKLIN WHITE, with Aliases

Sec. 588-b, Title 12, U. S. C. A. Bank Robbery

PROCEEDINGS

Apr.	16	1936,	Filing indictment
"	"	"	Issg. 2 capiases
"	27,	"	Flg. return capias, served as to White.
"	27,	"	" & ent. order directing that process issue for deft's.
		"	witnesses fees to be paid by United States.
"	28,	"	Flg. order to feed jury.
May	1,	"	Drawing & flg. jury lists for counsel.
"	1,	"	" jury roll
"	1,	"	Flg. verdict.
"	1,	"	Ent. Judgment, Jack Walker, P. G. White, P.N.G. Verdict Guilty. White 12 yrs. in U. S. Penitentiary
"	1,	"	Issg. 2 committments
June	4,	"	Flg. committment
May	9,	"	Flg. committment.

[fol. 23] DISTRICT COURT OF THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF TEXAS

I, Geo. W. Parker, Clerk of the District Court of the United States in and for the Northern District of Texas, do hereby certify the foregoing to be a true and correct copy of the

1. Indictment;
2. Judgment;

3. Sentence;
4. Committment, with Marshal's return thereon;
5. Docket entries by the Court; and
6. Proceedings shown on file docket,

in cause No. 632-Criminal, entitled The United States of America, Plaintiff against Jack Walker and Charles Franklin White, with respective aliases, Defendants as fully as the same remains on file and of record in said cause, in my office at San Angelo, Texas.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Court, at my office in the city of San Angelo, Texas in said District, this 4th day of April in the year of our Lord one thousand nine hundred and thirty-nine and of American Independence the 164th year.

George W. Parker, Clerk of said Court, by Jesse T. Couch, Deputy. (Seal.)

[fol. 24] Misc. Form No. 50

Sanford Bates, Director

Department of Justice, Bureau of Prisons, Washington

June 16, 1936.

To the Warden, U. S. Penitentiary, Leavenworth, Kans.:

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney General by the Director of the Bureau of Prisons has ordered the transfer of Jack Walker, #48924 from the U. S. Penitentiary, Leavenworth, Kans., to the U. S. Penitentiary, Alcatraz Island, Calif.

Now Therefore, you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official in charge of the institution in which the prisoner is now confined, are

hereby authorized to deliver the prisoner in accordance with the above order; and you, the warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him safely keep until the expiration of his sentence or until he is otherwise discharged according to law.

By direction of the Attorney General.

(Signed) Sanford Bates, Director, Bureau of Prisons.

Safer custody

A True Copy: W. F. Dorington, Record Clerk, U. S. P., Alcatraz.

Original.—To be left at institution to which prisoner is transferred.

(Here follow 2 photolithographs, side folios 25-25½)

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Record Form No. 1
(Revised Feb., 1936)

RECORD OF COURT COMMITMENT

Original for Central File

Department of Justice
PENAL AND CORRECTIONAL INSTITUTIONS
UNITED STATES PENITENTIARY
(Institution)
ALCATRAZ, CALIFORNIA
(Location)

Inst. Name WALKER, Jack No. 329-AZ

Alias Joe C. White - Jack Miller Color Age

True Name Jack Walker Name and number of prior commitments to Fed. Inst. Same, #48924, Leavenworth, Kansas

Offense NATIONAL BANK ROBBERY

District ND-TEXAS -SAN ANGELO

Sentence 12 YEARS Costs XX Committed XX Not Committed Paid
Fine XX Committed XX Not Committed Paid

Sentence changed New term Reason therefor

Sentenced MAY 1, 1936 When arrested AUGUST 12, 1935

Committed to Fed. Inst. MAY 4, 1936 Where arrested MEMPHIS, TEXAS

Sentence begins MAY 1, 1936 Residence AMARILLO, TEXAS

Eligible for parole APRIL 30, 1940 Time in jail before trial SINCE ARREST

Eligible for conditional release with good time MAY 21, 1944 Rate per mo. good time 10 Total good time possible 1440 days

Eligible for con. rel. with extra good time

A TRUE COPY:
W. F. DORINGTON
W. F. Dorington
Record Clerk

Forfeited good time Amount forfeited

Restoration good time Amount restored

Expires full term APRIL 30, 1948

Former Com. on Sentence to Other Institutions

No.	Name of Institution	Location
7130	STATE PENITENTIARY	SANTA FE, NEW MEXICO

Person to be notified in case of serious illness or death

Name MR. P.G. WALKER
Relation to prisoner FATHER
Address WASHBURN, TEXAS
Telephone

ACTION OF BOARD

Date	No. app.	Parole: Forth.	Parole: Effect.	Parole: Rel.	Parole: Den.	Parole: Cont.	War. is.	Rev.	Dis. from par.

Releases and recommitments on present sentence other than parole

Date	Method

DETAINERS FILED

Date	Nature of Detainer	Notify Whom	Remarks
3/13/36	LETTER	WARDEN, S.P. NEW MEXICO	Finish serving life sent.

25

OVER

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AUTHORIZATION FOR DISPOSITION OF MAIL AND PROPERTY

I hereby authorize the_____of the_____
(Warden or Superintendent) (Institution)

_____or his authorized representative, to open and examine all
(Location)
mail matter and express or other packages which may be directed to my address, and to sign my name as endorsement on all checks, money orders, or bank drafts, for deposit to my credit in the Prisoners' Trust Fund, as long as I am a prisoner in said institution.

In the event that I should die, I direct that my_____be notified and that all of my personal effects, including any money remaining to my credit in or due me from said

_____, be immediately transmitted to h____whose address is
(Institution)

_____

_____

Dated at the_____, this

_____day of_____, 19____

_____
(Name and Number)

I hereby certify that the above and foregoing was read and fully explained by me to the above-named prisoner before he signed the same, and that he signed the same voluntarily in my presence, this_____ day of_____, 19____

_____
Record Clerk

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[fol. 26] AFFIDAVIT OF CLYDE O. EASTUS

STATE OF TEXAS,
County of Tarrant:

Before me, the undersigned authority, on this day personally appeared Clyde O. Eastus, who, upon his oath, deposes and says: That he is the United States Attorney for the Northern District of Texas; that he was United States Attorney for the said Northern District of Texas During the year 1936; that during the May term of court for the San Angelo Division of the Northern District of Texas, Cause No. 632, United States vs. Jack Walker (with aliases) and Charles Franklin White was disposed of, the defendant Jack Walker having entered his plea of guilty to the charge of robbery of the First National Bank of Bronte, Texas, on or about the 1st day of July, 1935; that the defendant Charles Franklin White entered a plea of not guilty and was tried before a jury and found guilty; that the Court thereafter sentenced both defendants to twelve years in the United States Penitentiary at Leavenworth, Kansas, from which sentence the defendant White did not appeal.

The defendant Walker had no counsel, as he entered a plea of guilty. At the time the defendant Walker committed the offense in question he was an escaped convict from the State penitentiary of New Mexico, he having a life sentence to serve in that institution. This defendant was returned from the State penitentiary in New Mexico to San Angelo on a writ of habeas corpus ad prosequendum, issued by the Judge of this Court. This defendant was returned from the penitentiary at New Mexico by the then Deputy United States Marshal Elmer J. Reed. On the day of the trial, which was on April 28, 1936, I had the Marshal bring the [fol. 27] defendant Walker to the Federal Building from the jail and talked to him. I asked him whether or not he was guilty and he stated that he was. I asked him if he was going to plead guilty and he said that he was. I asked him if he had a lawyer and he said that he did not want an attorney.

There were three employees of the First National Bank of Bronte who positively identified the defendant Walker in this case in the trial of his codefendant White, as being one of the two men who entered this bank with guns and held it up. There can be no question about his guilt.

This defendant was sentenced on May 1, 1936 by the Judge to twelve years in the Leavenworth penitentiary, and on May 15, 1936, I received a letter from the subject Walker, written on stationary of the Leavenworth penitentiary, in which he stated: He was writing me to thank me for what I did for him in San Angelo. I had explained to this defendant that I thought the Judge would give him greater consideration, if he was guilty, by entering a plea of guilty. I undertook to get him to testify for the Government in this case, but he stated that he did not wish to do that. When he only received twelve years when he could have received twenty-five years, he evidently felt grateful.

Clyde O. Eastus.

(Verification.)

[fol. 28] AFFIDAVIT OF JOE H. JONES

STATE OF TEXAS,
County of Dallas:

Before me, the Undersigned authority, on this day personally appeared Joe H. Jones, who upon his oath says:

That I am and was during the year 1936 Assistant United States District Attorney for the Northern District of Texas, and during the April term of court for the San Angelo Division of the Northern District of Texas, being presided over by Hon. William Hawley Atwell, United States District Judge of said district, the case of United States versus Jack Walker and Charles Franklin White was called for trial. I assisted in the prosecution of this case with District Attorney Clyde O. Eastus. This was a case in which the two defendants were charged with the robbery of the First National Bank of Bronte, Texas, said robbery having occurred on or about the 1st of July, 1935.

I arrived in San Angelo on Saturday preceding the opening of court on Monday, for the purpose of preparing this case for trial, thinking that both defendants intended to enter pleas of not guilty to charges set forth in the indictment. When the case was called for trial, Jack Walker entered a plea of guilty and the defendant, Charles Franklin White, entered a plea of not guilty. Both defendants were given twelve years in the United States penitentiary at Leavenworth, Kansas.

Prior to the calling of the case, District Attorney Eastus and I talked with defendant Walker in the United States Marshal's office at San Angelo, in the presence of deputy marshal Elmer Reed. Walker stated to the District Attorney and me that he intended to enter a plea of guilty; that he had no lawyer and did not desire one, as he felt an attorney [fol. 29] would be of no value to him. Either Mr. Eastus or I told him that in our judgment if he would tell the Judge the truth and testify in the case as to who his companions were at the time of the robbery, that such fact would be considered by the Judge in passing sentence in his case. He stated he would enter his plea of guilty, but he would not testify in the case. Mr. Eastus or I then asked him if Charles Franklin White was with him at the time he robbed the bank. His reply was, "I would rather not say." Mr. Eastus or I one then asked him if the guns taken from him when he was arrested at Memphis, Texas, were the guns which were used in the robbery at Bronte, Texas, and his reply to this question was, "I would rather not say."

After the defendant Walker received the sentence of twelve years and was committed to the Leavenworth Penitentiary he wrote a letter to the United States Attorney, which was received by me and later forwarded to Mr. Eastus at Fort Worth, Texas, and in said letter Walker expressed his thanks to the United States Attorney for the fair and impartial treatment he received in the handling of the case at San Angelo. He also expressed complete satisfaction in receiving a twelve-year sentence, as he stated to Mr. Eastus and to me he was already under a life sentence in the New Mexico state penitentiary, and that he had made a good trade in trading a life sentence at hard labor for a twelve-year sentence in Leavenworth.

I have reviewed the file in this case and refreshed my memory as best I could, and my conclusion is that there was nothing about the case that either defendant was dissatis- [fol. 30] fied with, as the defendant White, who contested his case and lost, did not appeal after being sentenced to twelve years. He was identified by employees in the bank and customers, and there was no doubt about the guilt of either. The defendant Walker stated to the district attorney and me, and as I recall in open court to the Judge, that he was not represented by counsel, and did not desire counsel appointed for him; that he was pleading guilty, because he was guilty, and under those conditions and cir-

cumstances his plea of guilty was accepted and he was sentenced on such plea to twelve years, as above stated.

Joe H. Jones.

(Verification.)
(Seal.)

[fol. 31] AFFIDAVIT OF ELMER J. REED

John Alderman, Chief Probation Officer

Geo. E. Chollar, Walter P. Stokes, Elmer J. Reed, Probation Officers

UNITED STATES DISTRICT COURT, OFFICE OF THE PROBATION OFFICER, NORTHERN DISTRICT OF TEXAS

Abilene, Texas,
April 10, 1939.

My name is Elmer J. Reed, reside at Lubbock, Texas, United States Probation Officer for the Northern District of Texas.

During the year 1936 I was serving as Deputy United States Marshal for the Northern District of Texas.

On April 25th and 26th, 1936, I transferred one Jack Walker from the New Mexico State Penitentiary at Santa Fe, New Mexico to San Angelo, Texas, on a writ of Ad Prosequendum charged with bank robbery at Bronte, Texas.

While making this trip Jack Walker talked to me about the charge of which he was to be tried upon his arrival in San Angelo, Texas. He stated to me that he was guilty and that he was going to enter a plea of guilty when his case was called for trial. He also ask- him if he had an attorney to represent him in his trial and he stated that he did not and that he had no intentions of using a lawyer as he did not think that a lawyer would do him any good.

After arriving in San Angelo, Texas, on the late afternoon of the 26th day of April 1936, this defendant was talking to Hon. Clyde O. Eastus, United States Attorney and his assistant Joe Jones in my presence in the Federal building and he stated to Mr. Eastus that he was going to enter a plea of guilty. Mr. Eastus or Mr. Jones one ask- him if he had a lawyer to represent him and he stated that he did not and that he was not going to use a lawyer.

After this subject had entered his plea and had been sentenced by Hon. Wm. H. Atwell, Judge, he stated to me as we were returning him to the jail that he was perfectly satisfied and that he felt like he had got a break as he had traded them ninety nine years for twelve and that he could do the twelve years alright.

Elmer J. Reed.

(Verification.)

[File endorsement omitted.]

[fol. 32] In United States District Court

[Title omitted]

Order Appointing Attorney for Petitioner—May 25, 1939

It is, by the Court, Ordered that Willard S. Johnston, Esquire, whose address is 111 Sutter Street, San Francisco, California, be and he is hereby appointed as Attorney for the Petitioner herein.

[fol. 33] In United States District Court

Answer of Petitioner to Return to Order to Show Cause —Filed June 27, 1939

Come Now Jack Walker, the petitioner in the above entitled matter, and traversing the return to order to show cause on file herein, denies, admits and alleges as follows:

I

Denies that the issuance of said judgment and sentence, and order and return of commitment, or either or any of them, in criminal cause Number 632 on the first day of May, 1936, by District Judge William Hawley Atwell, of the United States District Court for the Northern District of Texas was due and regular, or was due, or was regular.

II

Denies, except as hereinafter specifically alleged, generally and specifically, each and every, all and singular, the

allegations contained in the affidavits of Clyde O. Eastus, Joe H. Jones and Elmer J. Reed, attached to and incorporated in said return, to the effect that petitioner stated to one or more of said affiants, or in the presence of one or more of them, that petitioner was guilty, that petitioner intended to enter a plea of guilty, that petitioner did not want or desire or intend to use an attorney, and that petitioner felt an attorney would be of no value to him. In this connection, petitioner alleges as follows:

That petitioner first learned that he was to be prosecuted for the crimes charged in the indictment, a certified copy of which is on file herein, on or about the 26th day of April, 1936, at which time petitioner was taken by said affiant, [fol. 34] Elmer J. Reed, from the New Mexico State Penitentiary to the place of trial at San Angelo, Texas; that thereafter and prior to the trial of petitioner said affiant Clyde O. Eastus came to petitioner and in the presence of said Elmer J. Reed and other persons, whose names and identity are unknown to petitioner, asked petitioner to plead guilty to said charges; that in reply thereto petitioner stated that he intended to plead not guilty; that thereupon said affiant Eastus exhibited to petitioner certain pictures of the scene of said alleged crimes and by means of them and otherwise sought to persuade petitioner that petitioner would be proved guilty at the trial of petitioner upon said charges; that thereupon petitioner refused to talk further to said affiant Eastus at said time; that thereafter and shortly prior to said trial of petitioner said affiant Eastus against came to petitioner; that at said last mentioned time petitioner requested said affiant to have said trial continued so that petitioner could communicate with his relatives and try to obtain money to enable him to hire an attorney for petitioner's defense, but that said affiant Eastus told petitioner that this was not possible and told petitioner to plead guilty to said charges, warning him that otherwise petitioner would be sentenced to double the term that he would receive if he pleaded guilty; that at no time herein mentioned did petitioner have any relatives, friends, or acquaintances, in or near San Angelo, Texas, other than petitioner's co-defendant, Charlie White; that at said last mentioned time petitioner asked affiant if petitioner could talk with his co-defendant, Charlie White, or the latter's attorney, but this request was also refused; that thereupon and because [fol. 35] of said warning and in fear of a prison term of

more than twelve years petitioner told said affiant that he would plead guilty to said charges.

III

Denies, except as hereinabove specifically alleged, generally and specifically, each and every, all and singular, the allegations contained in said affidavits to the effect that said affiants or any of them told petitioner that the judge would give petitioner greater consideration, if he was guilty, by entering a plea of guilty.

IV

Alleges that petitioner has no information or belief sufficient to enable him to answer the allegations contained in said affidavits to the effect that petitioner wrote a letter from the United States Penitentiary at Leavenworth, Kansas, to said affiants, or any of them, and basing his denial upon such lack of information or belief, denies, generally and specifically, each and every, all and singular, such allegations.

V

Denies, generally and specifically, each and every, all and singular, the allegations contained in said affidavits to the effect that petitioner stated in open court to the judge that he did not desire counsel appointed for him, that he was pleading guilty because he was guilty, and that petitioner's plea of guilty was accepted under those conditions and circumstances. In this connection, petitioner alleges that at none of the times mentioned in said petition or said return to said order to show cause was petitioner informed, nor did he know or believe, that he was entitled to the assistance of [fol. 36] counsel for his defense; that no one, at any time during said proceedings, asked petitioner if he desired the assistance of counsel for his defense, nor did anyone offer to procure the same for petitioner; that at all of said times petitioner was without any money to pay for the assistance of counsel and believed that he could not obtain the assistance of counsel without money to pay therefor; that petitioner attended school through the fifth grade and thereafter petitioner has had no schooling or education of any kind whatsoever; that petitioner was at all of the time herein mentioned entirely unversed in the law and was unable and unqualified to represent or act for himself in said

proceedings; that at no time during said proceedings was petitioner asked to waive his right to the assistance of counsel for his defense, nor did he by word, act or in any manner whatsoever state or indicate that he waived or intended to waive such right; that hereunto attached and marked Exhibit "A" and by reference incorporated herein and made a part hereof to the same purpose and effect as though it were set forth at length and fully rewritten at this point, is a letter dated at San Angelo, Texas, February 7, 1939, from George W. Parker, Clerk of the United States District Court for the Northern District of Texas, by Jesse T. Couch, Deputy Clerk, addressed to petitioner, showing that petitioner waived none of his rights as aforesaid, and that it was not the practice or custom in said court at said time to procure assistance of counsel for a defendant in a criminal prosecution, unless a plea of not guilty was entered.

[fol. 37]

VI

Denies, generally and specifically, each and every, all and singular, the allegations and conclusions contained in said affidavits to the effect that Petitioner is guilty and that the evidence introduced at said trial showed petitioner to be guilty. In this connection petitioner alleges that he is not guilty of the crimes charged in said indictment, or either of them.

VII

Denies, except as hereinabove set forth, generally and specifically, each and every, all and singular, the allegations contained in said affidavits to the effect that petitioner made statements and admissions as set forth in said affidavits.

Wherefore, petitioner prays that a writ of habeas corpus issue out from and under the seal of this Honorable Court as in petitioner's petition on file herein prayed and for such other and further relief as to this Court may seem meet and proper.

Dated: at San Francisco, California, June 22, 1939.

Willard S. Johnston, Attorney for Petitioner.

(Verification.)
(Admission of service.)

[fol. 38] EXHIBIT "A" TO ANSWER

Department of Justice
United States District Court
Office of the Clerk
Northern District of Texas

San Angelo, Texas, February 7, 1939.

Mr. Jack Walker, #329, Building No. 68, Alcatraz, California.

DEAR SIR:

Replying to your letter, (not dated), beg to advise that there is no waiver on file showing you forfeitted your right to have an attorney. According to the records you entered a plea of guilty, and I know of no law which requires a waiver of attorney to be filed. The writer was not in the court room when your case was called, and I of course do not know just what was said by you, but it has not been the practice or custom to appoint an attorney to defend unless a plea of not guilty is entered, and it is shown that the defendant is unable to employ an attorney.

Am sorry I am unable to furnish you the certified copy as requested by you, but there is no original waiver to make a certified copy from.

Very respectfully, Geo. W. Parker, Clerk, by Jesse T. Couch, Deputy.

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

No. 22969-R

JACK WALKER

vs.

JAMES A. JOHNSTON, Warden, U. S. Penitentiary, Alcatraz, California

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—July 10, 1939

The application for Writ of Habeas Corpus (by Order to Show Cause) came on this day to be heard. W. S. Johnston,

Esq., appeared as Attorney for the Petitioner, and A. J. Zirpoli, Esq., Assistant United States Attorney, was present for the Respondent. After argument by the Attorneys, the application for a Writ of Habeas Corpus was submitted to the Court, and the Court being fully advised, It Is Ordered that said application be and the same is hereby denied, that the Order to Show Cause be discharged, and that the Petition for Writ of Habeas Corpus be and the same is hereby dismissed.

[fol. 40] IN UNITED STATES DISTRICT COURT

AFFIDAVIT FOR APPEAL IN FORMA PAUPERIS—Filed July 27, 1939

UNITED STATES OF AMERICA,
State of California, ss:

Jack Walker, being first duly sworn, deposes and says:

That he is a citizen of the United States by birth and is of legal age; that he is in the custody of the United States and is being confined in the United States Penitentiary on the Island of Alcatraz, in the State of California.

That he is the petitioner in the above-entitled application for a writ of habeas corpus and that he is entitled to commence and maintain the same; that the above-entitled application came on for argument before the above court on the tenth day of July, 1939, and on said day the court made its order denying said application, discharging the order to show cause theretofore made in said proceeding and dismissing affiant's petition for a writ of habeas corpus; that affiant desires to take an appeal from said order to the Circuit Court of Appeals for the Ninth Circuit.

That affiant believes himself entitled to the redress sought to be obtained by said application and by such appeal; that the nature of said appeal is the determination of the scope and extent of affiant's right to assistance of counsel as guaranteed by the sixth amendment to the Constitution of the United States of America in the criminal prosecution of affiant in the United States District Court for the Northern District of Texas in criminal cause number 632 therein.

That affiant is without funds and unable to pay the costs of said appeal or to print the record therein, or to give

security for the same; that there is no person interested [fol. 41] by contract or otherwise in the said appeal or entitled to share in any relief thereunder who is able to pay or secure said costs; that this affidavit is made for the purpose of availing affiant of the rights and privileges in such case provided by section 832 of title 28 of the United States Code;

That unless affiant is permitted to proceed in forma pauperis for review in the Circuit Court of Appeals for the Ninth Circuit of the above-entitled case, he will be utterly unable to rectify the order of the above-entitled court.

Wherefore, affiant prays that he may have leave to prosecute said appeal in forma pauperis without costs or fee, pursuant to said statute.

Jack Walker.

Willard S. Johnston, Attorney for Petitioner.
(Verification.)

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

ORDER PERMITTING APPEAL IN FORMA PAUPERIS—Filed July 27, 1939

Upon reading the affidavit of the above-named petitioner for leave to prosecute an appeal in forma pauperis in the above-entitled matter, and upon good cause appearing therefor:

It Is Hereby Ordered:

That said petitioner be, and he is hereby permitted and allowed without the payment of any fees or costs and without giving any security therefor to prosecute his appeal to the Circuit Court of Appeals for the Ninth Circuit from the order of this court made on the 11th day of July, 1939, denying petitioner's application for a writ of habeas corpus discharging the order to show cause theretofore made in said proceeding and dismissing affiant's petition for a writ of habeas corpus.

Michael J. Roche, United States District Judge.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 27, 1939

Notice is hereby given that Jack Walker, petitioner above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying petitioner's application for a writ of habeas corpus, discharging the order to show cause theretofore made in said proceedings and dismissing affiant's petition for a writ of habeas corpus made and entered in this proceeding on the tenth day of July, 1939.

Dated: July 27, 1939.

Willard S. Johnston, attorney for appellant, Jack Walker, One Eleven Sutter Street, San Francisco, California.

[File endorsement omitted.]

[fol. 44] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD—Filed July 27, 1939

To the Clerk of the Above-entitled Court:

You are hereby requested to make a record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal in the above-entitled cause and to include in such record the following and no other papers and exhibits, to-wit:

1. Affidavit for leave to file petition for writ of habeas corpus filed March 28, 1939, in forma pauperis.
2. Order allowing filing of petition and prosecution in forma pauperis, made March 28, 1939.
3. Petition for writ of habeas corpus dated March 25, 1939, together with exhibits A, B, C, D and E attached thereto.
4. Order to show cause made by the above-entitled court and filed on the 28th day of March, 1939.
5. Return to said order to show cause dated May 15, 1939, together with exhibits 1, 2, 3, 4, 5 and 6 attached thereto.
6. Order of the above-entitled court appointing Willard S. Johnston as attorney for the petitioner herein, dated May 25, 1939.

7. Answer of petitioner to return to order to show cause, filed on the 27th day of June, 1939, together with exhibit A attached thereto.

8. Order of the above-entitled Court, denying application for writ of habeas corpus, discharging order to show cause and dismissing petition for a writ of habeas corpus, [fol. 45] made and entered on July 10, 1939.

9. Affidavit praying leave to take appeal in forma pauperis.

10. Order allowing appeal in forma pauperis.

11. Notice of appeal.

12. This praecipe and service thereon.

Said record is to be prepared as required by law, the Rules of this court, the Federal Rules of Civil Procedure and the Rules of the Circuit Court of Appeals for the Ninth Circuit and is to be filed in the office of the Clerk of said Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on or before the fourth day of September, 1939.

Dated: July 27, 1939.

Willard S. Johnston, Attorney for Appellant, Jack Walker, One Eleven Sutter Street, San Francisco, California.

(Admission of Service.)

[File endorsement omitted.]

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Wilbur, Garrecht and Haney, Circuit Judges

ORDER OF SUBMISSION—January 2, 1940

Ordered appeal in above cause argued by Mr. Willard S. Johnston, counsel for appellant, and by Mr. A. J. Zirpoli, Assistant U. S. Attorney, counsel for appellee, and submitted to the court for consideration and decision.

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE—February 6, 1940

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed in said cause and recorded in the minutes of this court in accordance with the opinion rendered therein.

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 9284

JACK WALKER, Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, Appellee

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before Wilbur, Garrecht and Haney, Circuit Judges

OPINION—Filed February 6, 1940

HANEY, Circuit Judge:

Appeal has been taken from an order denying a petition for a writ of habeas corpus. Appellant is confined to the United States Penitentiary at Alcatraz Island.

On April 14, 1936, appellant and another were indicted in a United States District Court in Texas. One count charged robbery of a national bank by force and violence and by putting certain employees in fear thereof. A second count charged defendants with using a dangerous weapon in committing the offense described in the first count. On April 28, 1936, a jury was sworn and the indictment was read. Appellant pleaded guilty, and his codefendant pleaded not guilty. The jury returned the following verdict:

"We, the jury, find the defendant Jack Walker guilty as charged in the indictment. We further find the [codefendant] guilty."

On May 1, 1936, judgment was pronounced sentencing appellant to imprisonment for twelve years.

[fol. 50] In his petition for a writ of habeas corpus, appellant alleged that he was being deprived of his liberty contrary to the Sixth Amendment of the Constitution because he did not know he was entitled to counsel when the proceedings under the indictment took place, was not so advised by the court, and did not waive such right. The court below made an order directing appellee to appear and show cause why the writ should not issue. Appellee thereupon filed a return, alleging that appellant was being detained under the judgment and sentence and Order and Warrant of Commitment. Certain documents were attached to the return, including three affidavits.

One affidavit was made by a United States Attorney who stated therein that at the time appellant committed the offense in question he was an escaped convict from New Mexico, and had a life sentence to serve there; that on the day of the trial he talked with appellant; that appellant stated that he was guilty; that appellant said he was going to plead guilty; that he asked appellant "if he had a lawyer and he said that he did not want an attorney"; and that on May 15, 1936, he received a letter from appellant wherein the latter thanked the attorney for what the attorney did for him in connection with the proceedings under the indictment.

One affidavit was made by an assistant United States Attorney, wherein he stated that he was with the United States Attorney when appellant was questioned; that appellant stated "that he had no lawyer and did not desire one, as he felt an attorney would be of no value to him"; that appellant "stated to the district attorney and me, and as I recall in open court to the Judge, that he was not represented by counsel, and did not desire counsel appointed for him; that he was pleading guilty, because he was guilty, and under those conditions and circumstances his plea of guilty was accepted"; and that the letter mentioned by the United States Attorney was one of thanks "for the fair and impartial treatment he received in the handling of the case".

The other affidavit was made by a United States Probation Officer who was previously a Deputy United States Marshal. The officer stated that appellant told him that he [appellant] "had no intentions of using a lawyer as he did not think that a lawyer would do him any good". The [fol. 51] officer also confirmed the statements in the other affidavits that appellant was asked "if he had a lawyer to represent him and he stated that he did not and that he was not going to use a lawyer".

In his traverse to the return, petitioner denied the statements in the affidavits related above, and alleged that the United States Attorney asked appellant to plead guilty, and he replied that he would plead not guilty; that thereupon the attorney exhibited certain pictures and sought to persuade appellant to plead guilty; that appellant refused to talk further with the attorney at that time; that thereafter he asked the attorney for a continuance in order to communicate with his relatives and attempt to obtain money with which he could hire counsel; that the attorney refused the request, and also appellant's request for an opportunity to talk with his codefendant or the latter's counsel; that because of his fear that he would be sentenced to more than twelve years, appellant pleaded guilty; and that such fear was caused by the fact that the attorney told him "to plead guilty to said charges, warning him that otherwise petitioner would be sentenced to double the term that he would receive if he pleaded guilty". Petitioner further alleged that at no time during the proceedings under the indictment, did he know or believe that he was entitled to counsel; that no one told him of such right; that no one offered to procure counsel for him; that at no time during the proceedings was he asked to waive such right; that he had attended school only through the fifth grade, was unversed in the law, was unable and unqualified to represent himself, and actually "believed that he could not obtain the assistance of counsel without money to pay therefor."

Attached to the traverse was a letter from the Deputy Clerk of the Court which rendered the judgment and sentence, and which contained the following statement: "The w ter was not in the court room when your case was called, and I of course do not know just what was said by you, but it has not been the practice or custom to appoint an attorney to defend unless a plea of not guilty is entered, and it is shown that the defendant is unable to employ an attorney".

The court below denied the petition for the writ, and this appeal followed.

[fol. 52] It is provided in 28 U. S. C. A. § 454 that an application for a writ of habeas corpus shall be made "by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known". The following section provides that the "judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto". Appellant contends that the preliminary examination mentioned in the latter statute means that the petition is to be examined as on a demurrer, and if the facts stated in the petition disclose that the petitioner is entitled to his release, then the writ must issue, and a full hearing held on the issues made by the petition and the return to the show cause order. Appellant asserts, therefore, that the court below erred in failing to issue the writ, in failing to hold a full hearing on the issues made by the petition and the return to the show cause order, and in denying the petition summarily.

Whether or not such contention is sound we need not consider, because in addition to the procedure mentioned in the statute, another manner of proceeding has been approved by the Supreme Court. By such procedure, upon the filing of the petition, an order to show cause why the writ should not issue is made. A return is made thereto by the detaining officer, thus enabling the court to determine from the petition and the return whether or not a case for the issuance of the writ has been made. Ex parte Yarbrough, 110 U. S. 651, 653; Zahn v. Hudspeth, 10 Cir., 102 F. (2d) 759, 762. The fact that the hearing was summary is not a valid objection because the court is directed by the statute to "proceed in a summary way". 28 U. S. C. A. § 461; Medley, Petitioner, 134 U. S. 160, 174. The effect of the rule is to require petitioner to submit whatever evidence he has with his petition or with his traverse to the return to the order to show cause. It is not suggested here that petitioner has not done so.

The procedure followed here was born of necessity. During the calendar year 1939, 105 petitions for writs of habeas corpus were filed in the court below, from only one of two divisions thereof, of which 74 were filed by prisoners in the

United States Penitentiary at Alcatraz Island. Appellee [fol. 53] presumably has certain duties to perform, the performance of which would be greatly hampered, if not prevented, if we were to require him to bring such prisoners into court. The practical utility of the procedure followed here is apparent.

With respect to the contention that appellant did not competently and intelligently waive his right to counsel, the only evidence supporting such contention is that of appellant. The three affidavits submitted with the return of appellee are in conflict with appellant's statements. From such affidavits it appears that when appellant was asked whether or not he had counsel, he replied to the effect that he did not want counsel. If the affidavits were believed, there is a clear waiver by appellant of his right to counsel. The trial court was not compelled to believe the statements made by appellant—a confessed criminal. The letter attached to the traverse does not conflict with the evidence of waiver. The applicable rules are fully stated in Harpin v. Johnston, No. 9328, this day decided.

Affirmed.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 9284

JACK WALKER, Appellant,

vs.

JAMES A. JOHNSTON, ETC., Appellee

DECREE—Filed and entered February 6, 1940

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[fol. 55] In United States Circuit Court of Appeals for the Ninth Circuit

Order Denying Petition for Rehearing—March 7, 1940

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed March 4, 1940, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. 56] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 57] Supreme Court of the United States

Order Extending Time Within Which to Apply for Writ of Certiorari

On consideration of the application of the petitioner in the above entitled cause, and good cause having been shown,

It is Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of 30 days from June 7, 1940.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 14th day of May, 1940.

[fol. 58] Supreme Court of the United States

Order Allowing Certiorari—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis. File No. 44522. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 173. Jack Walker, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California. Petition for writ of certiorari and exhibit thereto. Filed June 22, 1940. Term No. 173 O. T. 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 173

JACK WALKER,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

JACK WALKER,
Pro Se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 173

JACK WALKER,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justice of the Supreme Court of the United States, greetings:

Wherein comes now the petitioner, Jack Walker, appellant in the above entitled cause and petitions this Honorable Court for a writ of certiorari.

Summary of Subject.

Petitioner made application *in forma pauperis* to the U. S. District Court for the Northern District of California for a writ of *habeas corpus*—alleging that he had been deprived of his constitutional and statutory rights, and that the Warden (respondent)—was illegally restraining and

depriving petitioner of his rightful liberty by a "void process" of commitment, judgment and sentence in violation of the Constitution of the United States, Fifth and Sixth Amendments, Due Process, deprival of Counsel, and laws thereof, hence the judgment was void.

An order to show cause was issued by the District Court against the respondent, which subsequently after the return (which was only the *mittimus* of record) petitioner had been granted an attorney, and therefore a return was made by said attorney, the respondent filed three depositions in behalf of the United States said depositions being behind the record and of no account to a valid determination of the cause for said depositions were made by two United States Attorneys and a Deputy Marshal, petitioner was never given a fair and impartial hearing as the writ never issued and he was never produced in court to counter allege the depositions and to have a fair hearing into the cause of complaint, for he did not have opportunity to produce all the evidence he could have produced in said court, therefore the application was dismissed and the application and writ denied. (No opinion rendered.)

An appeal was granted from the order of denial to the Ninth Judicial Circuit Court of Appeals, and which resulted in an affirmance of the District Court's order.

WHEREFORE, comes now the petitioner, Jack Walker, and petitions this Honorable Supreme Court to grant and issue herein, a writ of certiorari to the Ninth Judicial Circuit Court of Appeals, San Francisco, California, for a transcript of all the necessary required portions of the records on cases #22969-R-D.C. and #9284 (C. C. A. 9), to this Honorable Court for a review thereon on appeal from the final order and decision of the Ninth Judicial Circuit Court of Appeals filed March 4, 1940, affirming the order of the District Court (on rehearing) denying petitioner's applica-

tion for a writ of *habeas corpus*—for a review of the legal and Constitutional law on the facts of said record in said denial—all of which will be raised herein as the questions of Constitutional law for review by this Honorable Court, and conjunctively pleaded as the errors of Constitutional law to the lower court in NOT SO HOLDING.

Jurisdictional Statement.

The Supreme Court of the United States is vested with jurisdiction to review on appeal in *habeas corpus* proceedings, the final order and judgment of the Circuit Court of Appeals by virtue of Section 463 (c) of Title 28, U. S. C., and governed thereunder through proceedings by the writ of certiorari provided for by Section 346-347 of Title 28 U. S. C.—also the act of February 13, 1925, ch. 229, 43 Stat. 936, Sec. 6 (c)—and as hereby applied for by the petitioner-appellant herein.

Facts and Questions Presented.

The legal question presented on the facts as cause for a *habeas corpus* in the District Court, and subsequently pleaded on appeal in the Ninth Circuit Court of Appeals as assigned errors to the lower court—and as herein now assigned as errors of law to the Ninth Judicial Circuit Court of Appeals in NOT SO HOLDING—and as now pleaded as invoking the jurisdiction of this Honorable Court on *habeas corpus*, and as reason for allowance of certiorari for a review thereof on appeal, are as follows:

I.

(A certified copy of the order of Judgment, Sentence #632 Criminal, of the U. S. District Court for the Northern District of Texas. R. 7-21.)

That there is nothing therein shown that the appellant had a counsel to defend him at his trial that he was never

asked if he had an attorney or if he wanted an attorney to defend him, and the record distinctly shows that he had no attorney, that nothing is shown he waived an attorney to represent him, and that not knowing of the rights guaranteed to him he could in no way competently waive a right he knew nothing about and that because he plead guilty under a duress does not make his sentence valid and does not deprive him of his right to counsel. And which upon ascertaining, reveals the fact that he had no attorney to defend him, and that he did not waive such right to counsel.

AND THE COURT BELOW ERRED IN LAW IN NOT SO HOLDING.

(Assigned Error 1.)

And a second Constitutional point of law and question raised, that the trial court by not appointing Counsel for the defendant petitioner herein lost jurisdiction to proceed and all proceedings from that moment on was void and a deprival of petitioner's right to due process of law.

AND THE COURT BELOW ERRED IN NOT SO HOLDING.

(Assigned Error 2.)

And as a third point in law and question raised is, can the affidavits be used against the petitioner, affidavits that are made by prosecuting officers that are men to convict and try to make their convictions stick, and affidavits that do not conform to the record and are not a part of the record, but behind and beyond the record, and by these affidavits to impeach the veracity of the petitioner who is only swearing to the record and is upheld by the record, the petitioner contends that this cannot legally be done.

AND THE COURT ERRED IN LAW IN NOT SO HOLDING.

(Assigned Error 3.)

And as a fourth point in law and question raised is, can a court just deny a petitioner without allowing him into court

to counter allege the returns and do whatever else he feels may be proper in the premises without having given him a chance to counter allege the affidavits and produce his own evidence in his own behalf. The petitioner contends that he must have a full and complete hearing and all evidence must be allowed and an opportunity given the petitioner to present his full cause.

AND THE COURT ERRED IN LAW IN NOT SO HOLDING.

(Assigned Error 4.)

The Circuit Court of Appeals cited no authority, either factual or legal for the interpretation of the constitutional points involved, and cited not one case out of the government's brief to sustain such position taken in law or the Constitution—and which also failed to answer in fact or law any of the contentions raised by the appellant.

The appellant in his reply brief had distinguished each case the government cited and relied upon in their brief, and presented to the honorable Circuit Court wherein they did not answer or apply adversely in law to the questions raised by the appellant—and this was evidently so, for the court in their opinion cited none of them to sustain their position taken, or any other authority.

Reasons Why Certiorari Should Issue.

Hence, to sum these said legal errors—the questions herein presented to the conclusional reason why a writ of certiorari should issue in this cause for a review thereof in the honorable Supreme Court, is as follows, to-wit:

The Ninth Judicial Circuit Court of Appeals in affirming the order of the District Court denying petitioner's application for a writ of *habeas corpus*, most likely ruled contrary and in conflict with their former decisions to the same questions of law on all questions presented by appel-

lant, and in conflict with decisions and rules of the honorable Supreme Court applicable to all questions presented—and which decision were presented in appellant's brief in support of his contentions.

It may be further noted that the *exact* circumstances and facts of petitioner's cause herein, which goes to the fundamental merit of the case and should have been decided, has never before been met and decided in any Federal court, and was not decided in this case although the appellant pleaded the proposition and supported it with general constitutional law and decisions applicable.

Wherefore: and because of the reasons as set forth above, the petitioner prays that this Honorable Court allow and issue a writ of certiorari directed to the Ninth Judicial Court of Appeals, San Francisco, California, for a review by this Honorable Court of their final order and decision affirming the District Court's denial of petitioner's application for a writ of *habeas corpus*—in order that petitioner's cause may be disposed of as law and justice require.

Respectfully submitted,

JACK WALKER,
Petitioner-Appellant.

Dated this 14 day of June, 1940, Alcatraz, California, by petitioner.

Argument and Authorities in Support.

As the facts and essential matters to a complete understanding of this cause have already been stated, appellant advances directly to his argument and law in support thereof.

In the exception of things, it is first pointed out that without doubt *habeas corpus* is the proper remedy, when one is deprived of his Constitutional rights, and that *habeas*

corpus will lie in such a case, as upheld by said authorities: *Johnson* v. *Zerbst,* 58 S. Ct. at p. 1025; *Brest* v. *Johnston, Warden,* (D. C.) #22862-L; *Ex parte Lange,* 18 Wall, U. S. at p. 163; *In re Snow,* 120 U. S. 274, 285, 7 S. Ct. 556; *Nielson,* petitioner, 131 U. S. 176, 9 S. Ct. 672; *Ex parte Peeke,* (D. C.) 144 F. at p. 1015; *Ex parte Siebold,* 100 U. S. 371, 375; *Ex parte Wilson,* 114 U. S. 417, 420, 5 S. Ct. 935; *Powell* v. *Alabama,* 287 U. S. at p. 45; *Avery* v. *State of Alabama,* 60 S. Ct. 321; affirming 188 So. 391, 237 Ala. 616. It was held by the Ninth Judicial Circuit Court in the case of: *Mackey* v. *Miller,* 126 F. 161; The court said:

> "The jurisdiction of a court or judge to render a judgment is always a proper subject of inquiry on habeas corpus; and if the court or judge had no jurisdiction to render it either because the proceedings of law under which they are taken are unconstitutional or for any other reason the judgment is void, and one who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus." Kaizi *v.* Henery, 211 U. S. 145; It was further held in the case of: U. S. *v.* Lair, 195 F. 47:
>
> "Where the court is without jurisdiction, release from custody may be obtained, notwithstanding the right of the defendant to challenge the validity of the court's action by writ of error." Anderson *v.* Denver, 265 F. at p. 3; Harlan *v.* McGourin, 213 U. S. 442, 31 S. Ct. at p. 44.

The appellant further states that all the points herein set out have previously been argued and set forth in motions and explained to the best of appellant's ability.

POINTS URGED.

Point One.

The appellant contends that he was deprived of his constitutional right by not being appointed a counsel to defend him and for his defense. The petitioner did not know that

he was entitled to counsel without cost, and he was helpless to procure counsel being without funds, and not being allowed to contact his friends to procure aid, therefore in no way could this appellant have waived his constitutional and fundamental right to be represented by counsel, and it is a well established rule, that the Federal courts have no power or authority to deprive an accused of his life or liberty unless he is represented by competent counsel, or unless he has waived this right, after his rights have been fully explained to him and he knows what he is entitled to and then competently waives it, this appellant not knowing of this right could in no way intelligently or competently or otherwise waive any right that he knew nothing about. As was stated by Mr. Justice Black in the case of *Johnson* v. *Zerbst* at p. 1023 (*supra*):

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege," and further stated at p. 1023 of Johnson *v.* Zerbst, (supra)
>
> "The constitutional right of an accused to be represented by counsel invokes of itself the protection of a trial court, in which the accused whose life or liberty is at stake is without counsel." Powell *v.* Alabama at p. 64; (supra); Brest *v.* Johnston, Warden, (supra). The Honorable United States Supreme Court at its last sitting handed down a case on counsel brought up from the State Courts and in words showed that it disapproved of the Courts not appointing counsel for defendants.
>
> U. S. C. A. Const. Amend. 14, Avery *v.* State of Alabama, 60 S. Ct. 321, affirming, 188 So. 391, 237 Ala. 616; where the court said:
>
> "Where denial of constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that United States Supreme Court scrupulously review the record."

In the Case of: Nabb *v.* U. S., 1 Ct. Cl. 173; the court held:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense." (U. S. Const. Amend. VI). The court always inquires of the accused upon his arraignment if he has counsel, and if he has none and lacks the funds with which to engage one, the court will assign Counsel to him. In Capital cases the Court is required to assign two counsels to him (18 U. S. C. 563). This assistance to indigent defendants is rendered by Counsel as one of their duties as officers of the court, and they receive no compensation therefor."

In a State case it states and goes further on a plea without Counsel and shows its disapproval in the case of:

Rhodes v. State (S. Ct. 2nd) at p. 393; where it states very emphatically:

"This court has expressed disapproval of trial courts receiving pleas of guilty from defendants charged with serious crimes, who are not represented by Counsel, until reasonable inquiry into the facts to discover whether a plea of guilty is entered freely and understandingly." Mislick *v.* State, 184 (2nd) 72, 110 N. E. 551; and again the same point was held in the case of:

Baker *v.* State, 130 Pac. at pp. 820, 821; Syllabus (I).

Where the Court said:

"It is the right of a person put upon trial for a criminal offense to be represented by counsel." Bill of Rights 20; Crime Proc. 6731 (Snyder's Comp. Laws 1909); and it has been further held in the constitution of the United States Sixth Amendment.

"In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense."

Therefore the right to counsel is a constitutional guarantee. The Sixth Amendment of the Constitution guarantees

that, "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense." Mr. Justice Black in *Johnson* v. *Zerbst, Warden*, 304 U. S. at pp. 462, 463, refers to the above amendment as follows: "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." "* * * If charged with crime, he is incapable generally, of determining for himself whether the indictment is good or bad. * * * He requires the guiding hand of counsel at every step in the proceedings against him." Appellant Walker, assuming that he did plead guilty, would, under the latest decision of the United States Supreme Court be entitled as a matter of right to counsel to advise him of his right under the indictment. The average indictment, and the one petitioner was sentenced upon is no different. It confuses most laymen and even some members of the bar. In short, as Mr. Justice Black has expressly held in the case cited (*supra*) "Counsel must guide every step in the proceedings," before one can plead guilty, or not guilty, to an indictment, the guaranteed right of counsel must be afforded him so that a defendant can protect his liberty if he is entitled to it. It cannot be doubted that the constitutional right to counsel may be waived by the defendant. Again referring to Mr. Justice Black in the *Johnson* v. *Zerbst, Warden,* case at p. 464 (*supra*), we find these remarks: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case including the background, experience and conduct of the accused."

Applying the Supreme Court's Rules of Waiver we find; a defendant with little or no education; a defendant who has come within the clutches of the law before, but never with the benefit of learning his rights as a defendant; a defendant never before a Federal court; a defendant easily scared as to a life sentence; and a defendant that was shown pictures of the scene of the crime; not allowed to send for his friends and a defendant forced into a plea of guilty, thereby forcing him to be a witness against himself, the court has only to look through petitioner's file to verify the illiteracy of the petitioner.

Public defenders are not commonly available in all jurisdictions, but assuming that upon demand counsel will be furnished in any given jurisdiction it is possible that many defendants do not avail themselves of that right because they are not aware of such a right.

It is true that the Constitution of the United States guarantees the petitioner the right of counsel at every stage of the proceedings, but how can a defendant, who probably never heard of the Constitution of the United States, know that he had such a right?

Appellant in the present case fits into the latter category. No one advised appellant of his right of counsel. United States Attorney Clyde O. Eastus (R. 17) in his affidavit goes into a long history of the appellant's case, but states at (R. 17) "The defendant Walker had no counsel, as he entered a plea of guilty." At (R. 17) "I asked him if he had a lawyer and he said that he did not want an attorney." This last statement is absolutely a falsehood, for this man at no time talked to appellant only to try to force him to plead guilty and to testify against his co-defendant. Because he could not force him to plead guilty, the U. S. Attorney admits in part at (R. 18) "I undertook to get him to testify for the government in this case * * *."

It will now be kindly noted by this Honorable Court as to the deposition here following and as to the contradictory evidence in two separate paragraphs.

Ass't U. S. Attorney Joe H. Jones, at (R. 18):

"I arrived in San Angelo on Saturday preceding the opening of court on Monday, for the purpose of preparing this case *for trial, thinking* that *both defendants intended to enter pleas of not guilty.*" (Italics supplied.)

(R. 19) "Prior to the calling of the case, District Attorney Eastus and I talked with defendant Walker in the United States Marshal's office, etc., Walker stated to the District Attorney and me that he intended to enter a plea of guilty; that he had no lawyer and did not desire one."

This appellant states that the last paragraph is false, perjured and biased.

At (R. 20) is a statement that is absolutely false as this man at no time talked to the appellant concerning his trial or what his intentions were as appellant did not even know where he was being taken or that he was to be tried or anything of that nature at that particular time.

It will now be noted that in the rebuttal to these affidavits although the appellant was not allowed to present all his evidence, it will be seen by a letter of the trial court as aforesaid that the clerk wrote to appellant at (R. 25): "Beg to advise that there is no waiver on file showing you forfeited your right to have an attorney. According to the records you entered a plea of guilty, and I know of no law which requires a waiver of attorney to be filed. The writer was not in the court room when your case was called, and I of course do not know just what was said by you, but it has not been the practice or custom to appoint an attorney to defend unless a plea of not guilty is entered, and it is shown that the defendant is unable to employ an attorney." It must be further shown that all these affidavits are prac-

tically made up of the same wording, it will further be noted and judicial notice taken of a letter received by the petitioner from the trial judge, a letter that was not used in the lower court for an exhibit and the only thing the Honorable Trial Judge had to say concerning the whole controversy.

This letter dated March 2nd, 1940; pertinent parts thereof are as follows:

> "I have your letter of February seventeenth. I recall quite distinctly, that you were tried in my court with another man who pleaded not guilty. Your plea was guilty. There was a lawyer who appeared in the case, and seemed to be conducting both your cause, and the cause of the other defendant, insofar as the preliminaries were concerned, * * *.
>
> It is my universal custom, to be sure that the party who enters a plea of guilty, knows what he is doing, and I have no reason to suspect that that was not done in your case."

The appellant contends in argument that nearly all affidavits and depositions he has seen or read as well as all letters from the courts all have the same well known axiom as stated in the last paragraph of this letter herein quoted, and it has seemed strange to the appellant that nearly all affidavits and depositions read alike. The appellant contends in argument that none of his depositions and letters or any of the respondent's are of any value, but that only the record of the case is what counts and what the courts can legally go by, and it is ridiculous to think or believe that any person, after handling hundreds of cases, can revert back to his memory years later and remember what was said by each and all that was done, and one cannot conceive of any United States Attorney trying to infer how good his memory is as to any particular defendant. As a matter of fact, the Honorable Judge William H. Atwell himself does not say that he asked appellant if he desired counsel. He

merely made no affidavit or deposition, he just remained mute on the subject. And in his letter to the appellant he just inferred that counsel represented appellant because he was defending his co-defendant, and if he did not represent him that the court never failed to inform one of his rights. Again under the Supreme Court Ruling, and taking into consideration petitioner's background, mentality and conduct, it is safe to assume that appellant did not waive his right to counsel, because he was not aware of the existing right.

Now referring to the Honorable Trial Judge above remaining mute, it must be further stated, that it is the duty of the trial court and Judge in order to determine whether there is an intelligent and competent waiver of counsel by the accused to see that such waiver clearly appears on record.

Again quoting the Supreme Court, 304 U. S. at p. 445 (*supra*):

> "The Constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused whose life or liberty is at stake * * * is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused, while an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court and it would be fitting and appropriate for the determination to appear upon the record."

In looking through appellant's record, what do we find? Nothing would be the appropriate answer, no transcript of the record to indicate what went on the day that appellant Walker was sentenced.

Interrogatories propounded to the trial judge resulted merely in arousing the Honorable Judge's ire. Judge W. H.

Atwell took the attitude that the dignity of the Federal Court was being lowered when asked certain pertinent questions (he remained mute); on the contrary, the dignity of the Court could best be preserved if proper and more adequate records were kept.

The United States Attorney and others that have made affidavits in this cause, assume that in the particular case at hand due process of law was adequately adhered to, because the general policy of their court is to adequately preserve due process of law.

What is due process of law?

Courts have been baffled from time immemorial. At best it is a conclusion of law. What we are trying to penetrate are the facts. One point remains undisputed. Honorable Trial Judge W. H. Atwell did not ask appellant if he desired counsel. The affidavits or depositions do not show that counsel was asked for and do not show that the Trial Judge offered counsel to the defendant and did not instruct defendant of his rights to counsel free of charge. It seems that it was presumed that if defendant had asked for counsel he would have been given one.

Yet the Supreme Court of the United States expressly holds that it is the duty of the trial judge to see that there is a proper waiver of counsel before another proceeding takes place.

The undisputed facts here show that no means were adopted by the trial judge to ascertain whether appellant waived his constitutional right to counsel. This should have been done before appellant's plea was entered, any other interpretation would make the Sixth Amendment and the decision of *Johnson* v. *Zerbst* (*supra*), a mere nullity. If defendants, such as appellant, does not get the protection of the constitutional right to counsel and the trial court does not completely satisfy the elements of an unequivocal

waiver, then the protection means nothing, because individuals who are well versed in the law and capable of protecting their rights, do not need the aid of counsel, but defendants, such as petitioner, should be given every right offered by the basic law of our land. It seems strange that persons and departments that caused the prosecution and obtained a conviction, should now make such statements at this time when they know them to be false? as for the great memory of these men, after many years have passed, it must be stated what a greater man than any of them or myself had to say.

Daniel Webster (1830) said:

> "Time is identical. Its subdivisions are all alike. No man knows one day from another, or one hour from another, but by some fact connected with it. Days and hours are not visible to the eye, nor to be apprehended and distinguished by the understanding. The flow of time is known only by something which makes it; and he who speaks of the date of occurrences with nothing to guide his recollection speaks at random and is not to be relied on." Works of Daniel Webster 8th Ed. 1854, Vol. VI, p. 82, quoted from "The Murder of Capt. Joseph White, at trial," and in 1857 Justice Wayne further strengthened Daniel Webster's view in Simpson *v.* Peaslee, where he said relative to time, "The term period in relation to time acts as a pointer, a distributor or sharer portioner." Justice Wayne pays high tribute to Daniel Webster as a "jurist, orator, and statesman", at Savannah, Ga. in 1847; Vol. 2 (8 ed.) p. 399 Works of Daniel Webster.

It must be conceded that without records the appellant surely could more fully remember what occurred, as it was directly against him and something that time could never erase from his memory as to the anguish and punishment that has been accorded him while under this sentence and therefore no one could recall the time and the circumstances

like he himself can recall, and surely his word is to be relied on more than any one else's word when he is the one that has suffered, and especially when the records support his contentions against and above the contentions of the United States Attorney.

Point Two.

The petitioner further contends, that although the Honorable trial court had jurisdiction over the person and subject matter, that by depriving the defendant appellant herein of his fundamental, constitutional and lawful rights the trial court lost jurisdiction, and every step taken from that moment on that was taken by the Honorable Court was without law and against the appellants right to due process of law; that although the appellant plead guilty a jury was impaneled to hear the cause although no attorney was appointed showing that the judge was not sure if appellant was pleading guilty or not, and the jury (R. 16-17) did hear the cause. That a deprival of an attorney and for the court to proceed was without law has been held in numerous cases as especially in the case of *Powell* v. *Alabama,* at p. 64 (*supra*) *Ex parte Lange,* 18 Wall. U. S. at p. 170; *Johnson* v. *Zerbst, Warden,* at p. 1024 (*supra*) states:

> "If the accused however is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth (6) Amendment stands as a jurisdictional bar to a valid conviction and sentence, depriving him of his life or his liberty."

The United States Constitution Fifth (5) Amendment also holds that:

> "No person shall be deprived of life, liberty or property, without due process of law."

Point Three.

The appellant further contends that by the trial court depriving appellant of his constitutional and fundamental rights under the Fifth (5) Amendment and Sixth (6) Amendment to the United States Constitution, lost jurisdiction to proceed and everything they done was void.

Therefore it is the earnest plea of this appellant that the jurisdiction of the Honorable trial court was lost, that the judgment is void and release from imprisonment may be obtained and is proper by *habeas corpus*, and was so stated by the Supreme Court of the United States in the case of *Johnson* v. *Zerbst*, at pp. 1024, 1025 (*supra*):

> "If the requirement of the Sixth (6) Amendment is not complied with the court no longer has jurisdiction to proceed."

The Federal courts are vested jurisdiction by the fundamental law of the Supreme Court of the United States, by the Constitution of the United States, and any act committed by these courts that are repugnant to the said Supreme law are of no force and invalid. The United States Constitution says, Art. III, Sec. II, at p. 414:

> "The jurisdiction of the federal courts is limited by the Constitution; but the courts thus created possess no jurisdiction but what is given them by the power which creates them."
>
> *Brest* v. *Johnston, Warden; Mackey* v. *Miller; Kaizi* v. *Henery; Harlan* v. *McGourin; Ex parte Coy; Ex parte Lange;* al. previously cited (*supra*) and *Stephens* v. *Biddle*, 20 F. (2d) 662.

Point Four.

The appellant further avers that as he could in no way question the affidavits against him, and as he was not taken into court so that he could produce all his evidence that he

was deprived of a fair and impartial hearing, and as the affidavits are behind the record and made years after, that they should not have been used against him, to impeach his testimony, and as although he had been practically forced into pleading guilty and being a witness against himself and nothing having been shown contrary to his allegations that are of record his word surely must stand in a law court when all his allegations are of record. The United States seems to be the only one allowed to obtain depositions and affidavits in their favor, and as he was not brought into court to testify in his own behalf and make counter allegations to said affidavits, for as he could and was not allowed in any way to file counter thereto or a questionari to said depositions to test the memory of the witnesses making said depositions, therefore and as a right and justice to said appellant said depositions should not have been used and should have been stricken from the records, and the court proceed therein by the records of the court before them.

In the case of *Johnson* v. *Zerbst*, 58 S. Ct. at 1019 (*supra*) there were two affidavits used to impeach the contentions of the appellants, and they were only referred to by this Honorable Court and then otherwise completely ignored, and it was there held that they were not of record, and neither are these affidavits of record in this case, but are only forms from Government officers produced by them on a questionnaire of other Government officers. There are numerous cases to uphold the petitioner's contentions and allegations on this particular point.

In the case of *Dowdell* v. *United States*, 221 U. S. 325, the Court said:

> "The provisions of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give the

testimony in his presence, and give to the accused an opportunity of cross-examination.

"It was intended to prevent the conviction of the accused upon depositions or ex-parte affidavits and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right to cross-examination."

It was also held in the case of *Dewitt* v. *Berry,* 134 U. S. 307, 10 S. Ct. 536, and in *Jenkins* v. *Preston,* 186 Fed. 609 that:

"Except where the terms of a written contract are obscure, uncertain, or indefinite, oral evidence is not admissible to add to change or contradict them."

Although these depositions are not oral testimony they were taken from such to impeach the record of the trial court, and it will be further noted in the State case of *Mills* v. *Commonwealth,* 13 Pa. 627, and the case of *United States Ex rel. Vallota* v. *Ashe,* at p. 742, where the court said:

"I need not repeat the authorities which established that consent cannot give jurisdiction. In criminal proceedings especially, that axiom has grown with the growth and strengthened with the strength of the law. Trials by lynch law might otherwise be valid; but at times I dare to say a man might consent to their jurisdiction, in hope or in fear, or perhaps in ignorance, * * * some affidavits and some certificates of such consent were produced at bar, but the counsel for the defendant positively deny it on their affidavits. But we can regard neither the one or the other; they are not part of the record, nor can they be made such. But for myself I think it a matter of no account, and if the prisoner had appeared in court, and under his sign manual, on the record, agreed to be then tried, it would not have the slightest influence with me. I look to the law of the land."

It is further stated in the rules of the Federal District Courts, rule 33:

> "The adverse party, shall have the right to cross-examine all witnesses appearing against him, either orally or in writing or both."

It further seems that at Title 28 U. S. C. A., Sec. 639, that this title and section does not allow affidavits to be used in the court against one unless the party involved was there to hear the making of such affidavit and allowed to question the persons making them, and is further strengthened by Title 18 U. S. C. A., Sec. 264:

> "On appeal from conviction the appellate Court must take the record as presented."

Ross v. *U. S.*, 93 F. (2d) 950, and *Diaz* v. *United States*, 223 U. S. 442, hold to the same rule as *Dowdell* v. *United States* (*supra*). Title 18 U. S. C. A., Sec. 241, states that:

> "On cross-examining defendant as to collateral matter, the Government must take his answers, and cannot introduce evidence to contradict it."
>
> *U. S.* v. *Sager*, 49 F. (2d) 725.

And in closing this point the appellant cites, and wishes the Court's attention to Judicial Code, Sec. 169:

> "In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said Court shall prescribe; and like opportunity shall be afforded the claimant in cases where testimony is taken on behalf of the United States, under like regulations."
>
> R. S. 1083; Mar. 3, 1911, C. 231, 169, 36 Stat. 1140.

As has been also stated herein the appellant by being forced to be a witness against himself, by threats and prom-

ises and by a coercing influence on the appellant, and whatever might have been thought of the law prior to the case of *Brown* v. *Mississippi*, 297 U. S. 278, it was by that decision established:

> "That in a proper case an accused must not be forced to be a witness against himself, nor to be deprived of his liberty without due process of law."

And that he must have the equal protection of the laws. The issue, of whether the appellant in the instant case was deprived of his constitutional rights, is therefore presented under the fifth and sixth and fourteenth Amendments, and upon the facts of the instant case it must be held, it is submitted, that he was deprived of those rights.

The Sixth Amendment declares:

> "In all criminal prosecutions, the accused shall enjoy the right to be represented by counsel."

And the fourteenth declares that:

> "No State shall deny to any person within its jurisdiction the equal protection of the laws."

As is further averred the appellant was without funds to employ counsel to advise him, he is practically illiterate; he had no one to give him assistance, financially or otherwise; and was strictly forbidden to call up his relatives. He stood indicted for a very serious crime, where practically the maximum could have been most of his life. He was under the coercive influence of an able United States Attorney, a prison guard and the Assistant United States Attorney, and he was in a very precarious situation. These three adroit and quick-witted officers of the law promised and threatened and demanded he plead guilty, a trial by an attorney to uphold petitioner's rights as granted by the constitution, it is one of, the fundamental safeguards

against the tyranny and injustice of courts and is the cope-stone of our democratic form of government, and that a person does not have to plead guilty is one of the most sacred rights given us under our great constitution; and it was clearly the intent of congress in the enactment of Title 18 U. S. C. A. Section 564 to enter a plea of not guilty if the defendant stood mute, and by compelling this appellant to be a witness against himself brings the instant case squarely within the meaning of *Brown* v. *State of Mississippi* (*supra*). In the *Brown* case, the accused had been convicted upon confessions obtained by third degree methods and his constitutional right against self incrimination was thus denied. The accused was represented by counsel and it was contended that failure of counsel to move for the exclusion of the confession, operated as a waiver of the constitutional right against self incrimination. The Supreme Court held that the demand of this right was not a mere error which could be thus waived by the attorney for the accused, but was an error which rendered the trial a nullity, Mr. Chief Justice Hughes at p. 286, of *Brown* v. *State of Mississippi* (*supra*):

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void."

In the case of: *Weeks* v. *U. S.*, 232 U. S. 392, the Court said:

> "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices, destructive of rights secured by the federal constitution, should find no sanction in the judgment of the courts".

Counselman v. *Hitchcock,* 142 U. S. 562, the Fifth Amendment to the United States Constitution also states that:

> "Nor shall be compelled in any criminal case to be a witness against himself."
> *Silverthorne Lumber Co., Inc.* v. *U. S.,* 40 S. Ct. 182.

In closing the appellant avers that he believes he has a meritorious cause for complaint and that he is entitled to the relief he seeks by a writ of *habeas corpus* and by certiorari in this Honorable Court.

Conclusion.

The Federal Constitution of the United States, and its amendments, and all other United States and State Courts, as well as the highest tribunal in the land, the Honorable Supreme Court of the United States, as well as truth and logic, all combine to support the petitioner's contentions.

To permit of such a would-be construction as the case here at bar before this Honorable Supreme Court of the United States, would allow manifold other American citizens to be put under the same circumstances at the whim or caprice of any United States Attorney, just in order to gain a conviction.

That the appellant here may be said to have erred in the drafting of this particular instrument, cannot militate against the proper legal and constitutional conclusions. That the petitioner is entitled to the rights and protection afforded every citizen of the United States. In as much as it appears from the records before this Honorable Court, that the trial court lost its jurisdiction, and that all their proceedings from that moment on was void and a violation of the appellant's rights by the bill of rights, the law and the Constitution of the United States, as well as its amendments.

Hence it is earnestly urged that the sentence is unjust, illegal, and against the United States Constitution, and should be voided, as law and justice require, and that therefore the writ should issue, and he be released from further illegal restraint.

Prayer.

WHEREFORE: your appellant prays, that an order of Writ of Certiorari issue, and that the case be remanded back ot the lower court with instructions that the writ issue and the appellant be released from further confinement, and if sufficient cause is shown, that this Honorable Court itself issue the writ of *habeas corpus* and release the appellant forthwith, as provided for by law. Also for these cogent reasons herein set forth, petitioner will then be allowed to go hence, and petitioner will ever pray.

Respectfully submitted,

JACK WALKER,
Petitioner-Appellant, in Pro. Per.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 173

JACK WALKER,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

CHARLES E. WYZANSKI, JR.,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 173

JACK WALKER,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 30-34) is reported in 109 F. (2d) 436.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered February 6, 1940 (R. 34-35). A petition for rehearing was denied March 7, 1940 (R. 35).

May 14, 1940, Mr. Justice Douglas of this Court extended the time within which to apply for a writ of certiorari for a period of thirty days from June 7, 1940 (R. 35). Petition for writ of certiorari was filed June 22, 1940 (R. 36) and was granted October 28, 1940 (R. 35). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

The petitioner claims that he is imprisoned in violation of the Fifth and Sixth Amendments to the United States Constitution. He is now committed to the respondent's custody pursuant to a sentence of a United States District Court for a crime of robbery, of which he alleges he is innocent. His application states that the sentence was pronounced under the following circumstances.

He first learned of the charge only two days before arraignment and while he was in custody in a city where he had no acquaintances. He requested a continuance so he could communicate with friends and get money to retain counsel. He requested access to his co-defendant or his co-defendant's counsel. These requests were refused. The District Attorney threatened him with twice as heavy a sentence unless he pleaded guilty. He did not know, and was not told by either the District Attorney or the court, that he was entitled to have counsel assigned to assist him without cost. Without competently waiving his right to counsel, he pleaded guilty and was thereupon convicted and sentenced to the penitentiary for twelve years.

On these allegations the following questions are presented:

1. Whether the petitioner's application for the issuance of a writ of *habeas corpus* state a *prima facie* case of im-

prisonment of the petitioner in violation of the Fifth and Sixth Amendments to the United States Constitution.

2. If the petitioner's application states a *prima facie* case, whether the District Court erred in not issuing a writ of *habeas corpus* commanding the prisoner to be brought before the court and erred in not permitting a full, expeditious inquiry wherein the petitioner would have reasonable opportunity to present testimony in support of the application by usual methods such as examining and cross-examining witnesses and offering depositions.

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the United States Constitution provides in part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

R. S. § 751 U. S. C. Title 28 § 451 provides:

> "The Supreme Court and the district courts shall have power to issue writs of *habeas corpus*."

R. S. § 754 U. S. C. Title 28 § 454 provides:

> "Application for writ of *habeas corpus* shall be made to the court, or justice, or judge authorized to

issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

R. S. § 755 U. S. C. Title 28 § 455 provides:

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

R. S. § 758 U. S. C. Title 28 § 458 provides:

"The person making the return shall at the same time bring the body of the party before the judge who granted the writ."

R. S. § 760 U. S. C. Title 28 § 460 provides:

"The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained."

R. S. § 761 U. S. C. Title 28 § 461 provides:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Statement of Facts.

Petitioner filed March 28, 1939 a petition for a writ of habeas corpus in the United States District Court for the

Northern District of California (R. 2-4). The petitioner alleged that he was imprisoned by respondent in the United State Penitentiary at Alcatraz pursuant to a sentence and commitment of the United States District Court for the Northern District of Texas; and that his imprisonment was unlawful because in the court where he was convicted and sentenced "he was deprived of his liberty without having the assistance of counsel, because he did not waive his lawful right for counsel * * * [and] * * *, because the trial Court did not ask the petitioner herein if he wanted counsel, or instruct him that he was entitled to counsel" (R. 3). To the petition were annexed (A) a copy of the indictment of the petitioner by the Grand Jury of the United States District Court for the Northern District of Texas (R. 7-9); (B) a copy of the record of the petitioner's trial and conviction (R. 9-10); (C) a copy of the record of the petitioner's sentence (R. 10-11); (D) a copy of the record of the petitioner's commitment (R. 11-12); and (E) the clerk's certificate that the foregoing were true copies.

March 28, 1939 District Judge Roche issued an order to respondent, the Warden of Alcatraz, directing him to show cause on April 24, 1939 why a writ of habeas corpus should not be issued (R. 5).

May 15, 1939 the Warden answered (R. 5-6). The answer incorporates the same court records annexed to the petition and also incorporates three affidavits executed respectively by Clyde O. Eastus, United States Attorney for the Northern District of Texas (R. 17-18); his assistant, Joe H. Jones (R. 18-20); and Elmer J. Reed, who in 1936 was Deputy United States Marshal for the Northern District of Texas (R. 20-21). The answer and affidavits in effect stated that after the District Attorney had informed the petitioner that he would get a lighter sentence if he pleaded guilty (R. 17, 19), and after the petitioner had said he would plead guilty (R. 17, 19, 20), the District Attorney

asked petitioner "if he *had*[1] a lawyer and he said he did not want an attorney" (R. 17, 19).

June 27, 1939 the petitioner filed a verified traverse under the style of an "answer of petitioner to return to order to show cause" (R. 21-24). The traverse denied the allegations of the answer and asserted that the petitioner did not know of his right to the assistance of counsel and did not waive his right to counsel in the Texas proceedings (R. 23-24) and that he was not guilty of the crime with which he was charged (R. 24, ¶ VI). The traverse also includes allegations to the following effect.

Petitioner first learned that he had been indicted for a bank robbery in violation of U. S. C. Ti. 12 § 588(b) when he was removed, in the custody of the United States Deputy Marshal, Elmer J. Reed, on Saturday, April 26, 1936, from Santa Fe, New Mexico, to the place of trial at San Angelo, Texas (R. 22).

On arriving in San Angelo, Saturday, April 26, 1936, the petitioner, in the presence of Deputy Marshal Reed, was under questioning by the United States District Attorney, Clyde O. Eastus, and by his assistant, Joe H. Jones (R. 22). The United States District Attorney asked the petitioner to plead guilty; but the petitioner refused to plead guilty or to talk further to the United States District Attorney (R. 22).

Two days later, just before the trial, the United States District Attorney again came to the petitioner. The petitioner requested the United States District Attorney "to have said trial continued so that petitioner could communicate with his relatives and try to obtain money to

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[1] Note that District Attorney Eastus (R. 17, 6 to 10 lines from the bottom of the page), his assistant Jones (R. 19, lines 5-7) and former Deputy Marshal Reed (R. 20) make it clear by the order of their statements that they never mentioned to the petitioner any question of counsel until he said he was guilty; and then they say merely that they asked him if he "*had* a lawyer," not if he *wanted* one.

enable him to hire an attorney for petitioner's defense, but that said affiant Eastus told petitioner that this was not possible and told petitioner to plead guilty to said charges, warning him that otherwise petitioner would be sentenced to double the term that he would receive if he pleaded guilty; that at no time herein mentioned did petitioner have any relatives, friends, or acquaintances, in or near San Angelo, Texas, other than petitioner's co-defendant, Charlie White; that at said last mentioned time petitioner asked affiant if petitioner could talk with his co-defendant, Charlie White, or the latter's attorney, but this request was also refused; that thereupon and because of said warning and in fear of a prison term of more than twelve years petitioner told said affiant that he would plead guilty to said charges'' (R. 22-23).

On the same Monday the petitioner was arraigned and pleaded guilty (R. 9, 17). ''No one, at any time during said proceedings, asked petitioner if he desired the assistance of counsel for his defense, nor did anyone offer to procure the same for petitioner; that at all of said times petitioner was without any money to pay for the assistance of counsel and believed that he could not obtain the assistance of counsel without money to pay therefor; that petitioner attended school through the fifth grade and thereafter petitioner has had no schooling or education of any kind whatsoever; that petitioner was at all of the time herein mentioned entirely unversed in the law and was unable and unqualified to represent or act for himself in said proceedings; that at no time during said proceedings was petitioner asked to waive his right to the assistance of counsel for his defense, nor did he by word, act or in any manner whatsoever state or indicate that he waived or intended to waive such right'' (R. 23-24).

With the foregoing conflict between the petitioner and respondent on issues of fact, the application for a writ of

habeas corpus came on for hearing before District Judge Roche, July 10, 1939 (R. 25). Despite the fact that the petitioner had prayed to be brought before the court (R. 4), he was not present. So far as appears, neither the petitioner nor his counsel was given (or waived) the opportunity to present testimony or examine and cross-examine possible witnesses, including those whose affidavits had been presented and others (like District Judge Atwell, see Petition for Certiorari, p. 13) who had refused affidavits. Solely on the basis of the papers before him and argument by the attorneys, and without making any finding of fact, District Judge Roche dismissed the petition for the writ of habeas corpus (R. 25-26).

July 27, 1939 petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 28). That court affirmed the order of the District Court, February 6, 1940 (R. 34-35) and denied a petition for rehearing (R. 35).

Summary of Argument.

We make two points in this case. First, we say that the application for the writ of habeas corpus is good on its face. Next, we say that since the application is *prima facie* good, and the ultimate issue is one of fact, the District Court should have issued the writ, held a full judicial inquiry and specifically found the facts.

In contending that the application is good on its face we note its more dramatic allegations. The petitioner, who went only halfway through grammar school, first learned of the charge of bank robbery against him when on a Saturday he was removed by a Deputy United States Marshal from Santa Fe, New Mexico, to San Angelo, Texas, where he had no acquaintances. He was kept in a Texas gaol from Saturday through Monday. Saturday the United States District Attorney vainly tried to get him to plead guilty. Monday the petitioner asked and was refused a

continuance so he could reach friends and thus raise money for counsel. He also asked and was refused the right to talk with his co-defendant or his co-defendant's counsel. The District Attorney told him he would get twice as heavy a sentence if he did not plead guilty. Finally, in isolation and in fear the petitioner agreed to plead and did plead guilty that very day. Neither the prosecutors nor the Court told him he was entitled, without cost to him, to have counsel assigned to him, and he did not know he had that right.

We assert that the foregoing allegations state a case of imprisonment in violation of the Fifth and Six Amendments. Our reliance is based upon precedents in this Court, the historical background of the Sixth Amendment and modern views of the rights of indigent prisoners. The case at bar falls within *Johnson* v. *Zerbst,* 304 U. S. 458, and *Powell* v. *Alabama,* 287 U. S. 45, which decide that an indigent prisoner charged with a serious crime is entitled to the assignment of counsel without cost at every step of the proceedings to aid him in scrutinizing the indictment and in preparing the case as well as actually trying it. If the matter were not clear on judicial precedent, it would be clear on an historical basis. The Sixth Amendment was, as contemporary evidence indicates, designed to require in all serious criminal prosecutions the same right to the free assignment of counsel prior to arraignment which existed under the English Treason Act of 1695 (well known to the American colonists by its citation in Blackstone, *Commentaries,* Book IV, p. 356) and which was proposed to the French draftsmen of the Declaration of Rights (LaRochelle, *Cahier du Tiers,* III, 161). Furthermore, precedent and history aside, modern commentators regard assistance of counsel prior to arraignment as a prerequisite of due process. See National Commission on Law Observance and Enforcement (popularly known as the Wickersham Com-

mission), *Report on Lawlessness in Law Enforcement,* Vol. IV, pp. 5, 7, 281.

Since the application is good on its face, and the ultimate issue is one of fact, the District Court was required by statute to issue the writ. R. S. §§ 755, 758. This is the practice followed in the orders of this Court (*Ng Fung Ho* v. *White,* 259 U. S. 276, 285) as well as in most, though not all, of the inferior Federal courts, and in England. It is a practice which is demanded by considerations of fair play, and has not been found inconvenient or impractical in Atlanta where one of the largest United States penitentiaries is located. Moreover, convenience is not an appropriate consideration in a proceeding that places at stake liberty of the person.

When the petitioner is brought into court on the writ he is entitled to a full inquiry into the facts and to specific findings of fact by the trial court. *Moore* v. *Dempsey,* 261 U. S. 86, 92; *Johnson* v. *Zerbst,* 304 U. S. 458.

ARGUMENT.

I.

On its face petitioner's application to the District Court states a case of imprisonment of the petitioner in violation of the Fifth and Sixth Amendments to the United States Constitution.

A. Introductory.

The first issue presented is whether *on its face* petitioner's application states a case of unlawful imprisonment. It is our contention that petitioner's imprisonment is unlawful under both the Fifth and the Sixth Amendments to the United States Constitution. We rest that contention upon cases decided by this Court, upon the historical background of the Sixth Amendment, and upon a rule of criminal pro-

cedure so widely adopted by modern authorities that it "reflects if it does not establish, the inherent right to have counsel appointed, at least in cases like the present." *Powell* v. *Alabama*, 287 U. S. 45, 73.

Before presenting those important constitutional contentions, however, we note a minor point of pleading which seems to be raised by the record. The point is whether this Court will treat not merely the original petition (R. 2-5) but also the petitioner's traverse (R. 21-25) as jointly constituting "the application for a writ of habeas corpus." It is our view that such joint treatment is proper and, indeed, that any contrary course would merely delay justice.

B. The Petition and the Traverse Together Constitute "the Application for a Writ of Habeas Corpus."

We contend that "the application for a writ of habeas corpus" which was heard in the District Court and is under review here includes not merely the original petition (R. 2-5) but also the petitioner's traverse (R. 21-25).

The habeas corpus statutes provide for both of these documents. R. S. §§754, 760; U. S. C. Tit. 28 §§454, 460. The petitioner verified both [2] of these documents. And the District Court and the Circuit Court of Appeals treated both petition and traverse as one application (R. 25-26, 32), as was proper under Rule 8(f) of the Rules of Civil [3]

[2] In printing the traverse the verification was omitted. However, we have procured from the Deputy Clerk of the United States District Court for the Northern District of California an affidavit that although the traverse was executed by petitioner's then counsel, it was verified by petitioner himself. [We do not suggest that the traverse would be bad if verified by someone other than the petitioner. (Cf. *In re Neagle*, 135 U. S. 1, 3; *Collins* v. *Traeger*, 27 F. (2d) 842, 843 (C. C. A. 9); *United States ex rel. Bryant* v. *Houston*, 273 Fed. 915, 916 (C. C. A. 2); *The Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810).]

[3] Habeas corpus is a civil proceeding. *Ex parte Tom Tong*, 108 U. S. 556, 559-560. The Rules of Civil Procedure would seem to be applicable to this aspect of a habeas corpus proceeding. See Rule 81(a)(2).

Procedure (which requires that "all pleadings shall be so construed as to do substantial justice") and under the modern statute of jeofails, Act of February 26, 1919, c. 48, 40 Stat. 1181, Judicial Code § 269, U. S. C. Tit. 28 § 391. Cf. R. S. § 760; U. S. C. Tit. 28 § 460. Even "in days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined." [Halsbury, L. C., in *Cox* v. *Hakes*, 1890 A.C. 506, 514.] We cannot suppose that this Court will now look only at the petition and disregard the traverse, particularly in view of this Court's decisions in *Cuddy, Petitioner*, 131 U. S. 280, 283, and *In re Neagle*, 135 U. S. 1, 7, and the following additional considerations. No one raised this technical difference between the petition and the traverse in any inferior court. Cf. *Clements* v. *Moore*, 6 Wall. 299, 310-311. The prisoner had the aid of counsel only when he verified the traverse, not when he drew and verified the petition. And if the petition in the case at bar should be denied solely because it does not set forth the allegations contained in the traverse, nothing but delay would be achieved. Under the rule that a refusal to issue a writ of habeas corpus is not *res judicata* the prisoner could at once file a new petition embracing the allegations of the traverse. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239; *Ex parte Royall*, 117 U. S. 241, 254. Cf. *Kessler* v. *Strecker*, 307 U. S. 22, 25.

C. A Summary of the Salient Facts Alleged in the Application.

If, then, both the petition and the traverse are regarded as one application, these are the salient facts alleged to show that the imprisonment is in violation of the Fifth

and Sixth Amendments[4] to the United States Constitution:

The petitioner, a man who went only halfway through primary school, was indicted for one of the most serious federal crimes—robbing a national bank—a crime of which he now alleges he was innocent (R. 24, ¶ VI). He first learned of that indictment Saturday, April 26, 1936, while he was in the custody of a Deputy United States Marshal who was taking him as his prisoner from Santa Fe, New Mexico, to San Angelo, Texas, a place where he had no acquaintances.

On his arrival in San Angelo that Saturday he was kept in prison and was subjected to questioning by the United States District Attorney in the presence of an Assistant United States Attorney and the Deputy Marshal. He remained steadfast in his statement that he was not guilty and intended to plead not guilty. The United States District Attorney went away leaving the man in gaol.

The following Monday the United States District Attorney returned. He told the petitioner he was going to be tried and if he did not plead guilty, he would get twice as heavy a sentence.

The petitioner asked for a delay so that he might communicate with his relatives to get funds to hire an attorney. The United States District Attorney said that was impossible.

The petitioner asked at least to talk with his co-defendant or his co-defendant's attorney. That request also was refused.

The petitioner, isolated, without counsel, in fear of excessive penalties, finally told the United States District Attorney he would plead guilty.

[4] The petition specifically invoked the Sixth Amendment (R. 3). The "Statement of Points upon which Appellant intends to rely" [not printed as part of the record in this Court] filed in the Circuit Court of Appeals September 2, 1939 pursuant to Rule 75(d) of the Rules of Civil Procedure, specifically invoked the Fifth Amendment.

The petitioner was forthwith brought into court and arraigned. He then pleaded guilty.

At no time did the District Attorney or the District Judge tell the petitioner that he was entitled not only to the assistance of counsel but also, if the petitioner were without funds, to the appointment of counsel by the Court without cost to him. Moreover, the petitioner did not know he had these rights and did not waive them.

We contend that an application alleging the foregoing facts states a plain case of a denial of the due process of law guaranteed by the Fifth Amendment to the United States Constitution and a denial of the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. We support this contention by reference to decisions of this Court interpreting the two "due process" clauses and the "assistance of counsel" clause of the Constitution, by reference to the historical background of the Sixth Amendment and by reference to the better practice and better views with respect to the rights of indigent prisoners.

D. Controlling Decisions in This Court.

The petitioner's application states a case that falls squarely within the *ratio decedendi* of *Johnson* v. *Zerbst*, 304 U. S. 458, within the principles enunciated in *Powell* v. *Alabama*, 287 U. S. 45, and *Avery* v. *Alabama*, 308 U. S. 444, and within the *per curiam* disposition made in *Frame* v. *Hudspeth*, 309 U. S. 698.

Johnson v. *Zerbst* is, in our view, indistinguishable. There the prisoner, an enlisted man in the United States Marine Corps, was arrested November 21, 1934, together with another marine. Both were charged on that day with the crime of feloniously uttering, passing and possessing counterfeit Federal Reserve notes. They were represented

by counsel in preliminary hearings conducted by the United States Commissioner. Two months later, January 21, 1935, the marines were indicted. January 23rd they were arraigned in a United States court, and pleaded not guilty. At the arraignment they said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of counsel. (304 U. S. 460.)

Subsequently the prisoner petitioned for a writ of *habeas corpus*. In that *habeas corpus* proceeding the lower courts denied relief. On review, this Court held that the petitioner was entitled to be discharged if on remand the District Court should find that the petitioner had not competently waived his right to counsel. This Court held that "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty * * * If the accused * * * is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty" (304 U. S. 467-468).

Writing for the Court, Mr. Justice Black quoted from *Powell* v. *Alabama*, 287 U. S. 45, 69, the statement of Mr. Justice Sutherland that if a layman is "charged with crime, he is incapable, generally, of determining for himself *whether the indictment is good or bad.* He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial *without a proper charge,* and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the

skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel *at every step* in the proceedings against him." (Italics added.)

In all significant respects the case at bar is like *Johnson's* case because each involves a petitioner who had no counsel at the arraignment and trial of a serious (but not a capital) offense; who was imprisoned in a strange city where he had no acquaintances; who was never informed by the prosecutor or the court that he was entitled without cost to him to have counsel appointed for him; and who did not competently waive the rights to assistance of counsel.

Indeed, in some respects, the case at bar is a much stronger case for the petitioner than was *Johnson's* case:

1. Here, the petitioner specifically requested and was refused a continuance so he could communicate with his relatives and try to obtain money to enable him to hire an attorney (R. 22). There, the petitioner, so far as appears, made no such request during the two months he was incarcerated and received no such refusal.

2. Here, the petitioner specifically requested and was refused a right to confer with a particular lawyer (R. 22). [Cf. *Levine* v. *Hudspeth,* 102 F. (2d) 691 (C. C. A. 10); *Howard* v. *Dowd,* 25 F. Supp. 844 (N. D. Ind.).] There, the petitioner actually conferred with counsel at the preliminary hearing before a United States Commissioner, but, so far as appears, never again asked to confer with him or any other specific lawyer.

3. Here, the petitioner learned of the general nature of the charge two *days* before he was arraigned. There, the petitioner learned of the general nature of the charge two *months* before he was arraigned.

4. Here, the petitioner was refused contact with his co-defendant. There, the petitioner had the advice and assistance of his co-defendant.

5. Here, the petitioner had gone only halfway through grammar school. There, the petitioner had sufficient intelligence to become a United States marine.

6. Here, the petitioner was induced to make what he now alleges is a false plea of guilty by threats of the District Attorney, who told him he would be given twice as heavy a penalty if he pleaded not guilty, stood trial and was convicted. There, no similar circumstances were alleged.

The Government may try to distinguish the case at bar from *Johnson's* case on two grounds: first, that here the petitioner had previously been in court and had been convicted of another crime, while there the petitioner had never previously been charged with any offense; or second, that here the petitioner pleaded guilty, while there the petitioner pleaded not guilty and stood trial. Neither ground of distinction is tenable.

There is no merit whatsoever to the first purported distinction. The fact that a man had been previously tried in a criminal court does not show that he knows that the United States Constitution guarantees him the assistance of counsel. *United States ex rel. Nortner* v. *Hiatt*, 33 F. Supp. 545, 546 (M. D. Pa.). During and after the earlier trial he may not have learned anything of his constitutional rights. In that earlier trial (as in the later trial) his rights may have been infringed without his being aware of the infringement: that is, he may have had no counsel and no knowledge (then or later) of his right to have counsel assigned. Or he may *then* have been able to pay for counsel and not known that, if he were indigent, he would have a

right to have counsel assigned to him without cost to him. Neither of those possibilities is foreclosed by the record in the case at bar.

Nor is there any justification for distinguishing this case from *Johnson's* case on the ground that here the petitioner pleaded guilty while there he pleaded not guilty.

There is no intimation in this Court's opinion in *Johnson* v. *Zerbst* that that case in any way turned upon the particular type of plea which had been made by the petitioner. In fact, the intimation is directly the other way. Mr. Justice Black's opinion (304 U. S. 463), like the earlier opinion of Mr. Justice Sutherland in *Powell* v. *Alabama,* 287 U. S. 45, 69, makes it plain that a person charged with a serious crime is entitled to the assistance of counsel at "*every* step in the proceedings against him." And both opinions place particular emphasis upon the point that a layman needs a lawyer to determine "whether the indictment is good or bad." It follows that a prisoner is entitled to the assistance of counsel at the arraignment and a reasonable time before that event [5] to aid him in scrutinizing the indictment and to aid him in pleading.

Moreover, any suggestion that the doctrine of *Johnson* v. *Zerbst* was limited to persons who pleaded not guilty cannot stand in the light of what this Court, with the consent of the present Solicitor General, did last term in *Frame* v. *Hudspeth,* 309 U. S. 698. In that case the petitioner alleged that he had pleaded guilty without being given the assistance of counsel and when he was mentally incompetent to waive his right to counsel. Although the District Court denied the writ of habeas corpus for which the petitioner had applied, and although the Circuit Court

[5] In *Powell* v. *Alabama,* 287 U. S. 45, 71, the Court held that "it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by the assignment *at such time* or under such circumstances *as to preclude the giving of effective aid in the preparation and trial of* the case." (Italics added.)

of Appeals affirmed, this Court reversed and remanded the cause "to the District Court for the purpose of making a full inquiry into the mental status of the petitioner at the time he entered the plea of guilty." See also *Levine* v. *Hudspeth,* 102 F. (2d) 691 (C. C. C. A. 10); *Mothershead* v. *King,* 112 F. (2d) 1004 (C. C. A. 8); *Howard* v. *Dowd,* 25 F. Supp. 844, 845 (N. D. Ind.); *Erwin* v. *Sanford,* 27 F. Supp. 892 (N. D. Ga.).

In view of *Frame's* case and the lower court cases just cited, it seems unnecessary to elaborate the point that the doctrine of *Johnson* v. *Zerbst* applies to a person who pleaded guilty without competently waiving his right to assistance of counsel. Any other conclusion would be shocking, particularly since in about three-fourths of all federal criminal cases the accused pleads guilty.[6] It would allow the Government in all those cases to do what the Government virtually admits that the United States District Attorney did here: to isolate an indigent prisoner until the prosecutor obtained from him, either by fear or improper bargains or misunderstanding, a plea of guilty and then, after counsel would be almost useless, to tell the prisoner he might go through the ceremonial rite of having counsel present when the sentence was imposed. Furthermore, it would overlook the great importance of arraignment and pleading which has been regarded as a cornerstone of our criminal procedure by this Court (Cf. *Crain* v. *United States,* 162 U. S. 625, 636-646) as well as generally [see National Commission on Law Observance and Enforcement (popularly called the Wickersham Commission), *Report on Lawlessness in Law Enforcement,* Vol. IV, pp. 281, 5, 7; American Law Institute, *Code of Criminal Procedure,* Sec. 203 and State statutes cited pp. 630-634.]

Ex majore cautela, we add that in testing the application (i. e., the pleading) in the case at bar to see whether it states

[6] Annual Report of the Director of the Administrative Office of the United States Courts, Sept. 16, 1940, pp. 78-86.

a *prima facie* case within the rule laid down in *Johnson* v. *Zerbst*, it is of no significance whether (as held in *Johnson* v. *Zerbst*) the petitioner cannot secure his final discharge unless he bears the burden of proving the facts he alleges and until the District Court finds on full inquiry that he did not waive his right to the assistance of counsel. The Ninth and Tenth Circuits to the contrary notwithstanding, burden of proof has nothing to do with the demurrability of a petition for a writ of habeas corpus.

E. Historical Background of the Sixth Amendment

In our view, as explained in the preceding subdivision of this brief, the petitioner should prevail if he merely rested his case upon the precedents in this Court. All the recent cases support our contention that the due process clauses [7] and the assistance of counsel clause guarantee that in a criminal prosecution the defendant, unless he competently waives the right to counsel, shall be informed that he is entitled to counsel selected by himself or, if he is indigent, selected and assigned by the court.

But we need not rest on recent precedent alone. Our contention is buttressed by the constitutional history of the Sixth Amendment.

After the Constitutional Convention adjourned at Philadelphia, September 17, 1787, the Constitution as it then stood without any Bill of Rights was considered by specially convoked conventions in the separate States. In many of the States it became apparent that ratification could not be secured except upon the condition that steps should be taken immediately after the national government was

[7] In the preceding subdivision chief emphasis was placed upon *Johnson* v. *Zerbst*. However, reliance was also placed upon *Powell* v. *Alabama*, which, though dealing specifically with the due process clause of the Fourteenth Amendment, aids in the interpretation of the parallel due process clause of the Fifth Amendment.

formed to add to the Constitution a Bill of Rights. Charles Warren, *The Making of The Constitution,* p. 510.

In discussing Bills of Rights at the State conventions held in Massachusetts,[8] New Hampshire,[9] Maryland,[10] Virginia,[11] Pennsylvania [12] and North Carolina [13] special emphasis was placed on criminal procedure. As the references just made in the margin indicate, each of those states considered (and, with the exception of Maryland and Pennsylvania, adopted) particular provisions to safeguard the rights of an accused in a criminal proceeding brought by the United States. Our interest in the case at bar is particularly in the Virginia and Pennsylvania conventions, for it was in the Bills of Rights presented to those assemblies that reference was made to provision for assistance of counsel.

Before turning to the actual proposals from Virginia and Pennsylvania, however, it is important to have in mind exactly what the text of Blackstone's *Commentaries,* then current [14] in the colonies, said was (and in fact what actually was) the law of England as to the right of counsel in criminal cases. It is well enough known [15] that Blackstone had correctly stated and criticised the English common law rule

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[8] *Memoir of Theophilus Parsons;* by his son, Theophilus Parsons (Boston 1859), pp. 70, 79; *Debates and Proceedings in the Convention of the Commonwealth of Massachusetts held in the year 1788* (Boston 1856), pp. 80, 84, 87-92; Elliot's *Debates on the Federal Constitution* (1861), Vol. II, p. 177.

[9] Joseph B. Walker, *A History of the New Hampshire Convention* (Boston 1888), p. 50.

[10] Elliot's *Debates,* Vol. II, pp. 550, 555.

[11] *Ibid.,* Vol. III, p. 658; Kate Mason Howland, *The Life of George Mason* (N. Y. 1892), Vol. II, pp. 444, 446.

[12] J. B. McMaster and F. D. Stone, *Pennsylvania and the Federal Convention* (1888) pp. 421, 461.

[13] Elliot's *Debates,* Vol. IV, pp. 243-251.

[14] The quotations from Blackstone have been checked against John Adams' personal copy of Blackstone now in the Adams collection of the Boston Public Library.

[15] See *Powell* v. *Alabama,* 287 U. S. 45.

that in a trial for a capital crime the prisoner was not entitled to counsel except upon a point of law.[16] But it seems hitherto to have escaped attention that on the next page [17] Blackstone cites and quotes from the English Treason Act of 1695.[18] By contrast with the common law, that statute gave a person indicted for treason a right to consult

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[16] Blackstone, *Commentaries,* Book IV, p. 355, states:

"But it is a settled rule at common law, that no counsel shall be allowed to a prisoner, upon his trial upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. A rule, which • • • seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law."

[17] Blackstone, *Commentaries,* Book IV, p. 356, states:

"By statute 7 W III c. 3 • • • persons indicted for such high treason, as works a corruption of the blood or misprision thereof, (except treason in counterfeiting the king's coin or seals) may make their full defence by counsel, not exceeding two, to be named by the prisoner, and assigned by the court or judge."

[18] The Treason Act, 1695 (7 and 8 Will. III, c. 3) § 1 [reprinted IV Halsbury's *Statutes of England,* pp. 328-329] provides:

"From and after the five and twentieth day of March in the yeare [sic] of our Lord one thousand six hundred ninety six all and every person and persons whatsoever that shall bee [sic] accused and indicted for high treason whereby any corruption of blood may or shall bee [sic] made to any such offender or offenders or for misprision of such treason shall have a true copy of the whole indictment delivered unto them or any of them *five days* att [sic] the least *before he or they shall be tried* for the same *whereby to enable them* and any of them respectively *to advise with counsell* [sic] *thereupon to plead* and make their defence his or their attorney or attorneys agent or agents or any of them requiring the same and paying the officer his reasonable fees for writing thereof not exceeding five shillings for the copy of every such indictment. And that *every person* soe [sic] accused and indicted *arraigned* or tryed [sic] *shall bee* [sic] received and *admitted to make* his and their full *defence by counsel* learned in the law and to make any proof that hee [sic] or they can produce by lawful witnesse [sic] or witnesses who shall then be upon oath for his and their just defence in that behalfe [sic]. And *in case any person* or persons so accused or indicted *shall desire counsel the court* before whom such person or persons shall bee [sic] tryed [sic] or some judge of that court shall and *is* hereby authorised and *required immediately* upon his or their request *to assign to such person* and persons such and soe [sic] many *counsel* not exceeding two as the person or persons shall desire to whom such counsel shall have free accesse [sic] at all seasonable houres [sic] any law or usage to the contrary notwithstanding." (Italics added.)

counsel before he pleaded as well as at the arraignment and trial; and in case any person indicted had no counsel the court was required to assign to such person counsel on his behalf.

The significance of this passage from Blackstone and the cited statute is immediately apparent when we turn to the proceedings in the Pennsylvania Convention. The leaders of that Convention, Wilson, Whitehill, Smilie and Findley,[19] were not merely aware of Blackstone, they actually carried copies of the *Commentaries* to the Convention floor [20] to aid them in debate. Thus when at the end of the session the minority proposed that in criminal prosecutions the accused has a right to be heard by himself and his counsel [21] they probably meant that the English practice with respect to ordinary capital crimes should not be followed, but that instead the English practice with respect to treason trials should be followed and counsel should be assigned by the courts to aid necessitous defendants both in pleading and in trial.

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[19] J. B. McMaster and F. D. Stone, *Pennsylvania and the Federal Convention* (1888), pp. 229, 360, 406.

[20] *Ibid.*, p. 406 (December 11, 1787); see also Elliot's *Debates*, Vol. II, p. 513.

[21] *Ibid.*, pp. 454, 461, gives the following text from "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents":

"3. That in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusation, as well in the federal courts as in those of the several States; *to be heard by himself and his counsel;* to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; and that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." (Italics added.)

Note, however, that the text as set forth at p. 421 uses the phrase "to be heard by himself *or* his counsel." Also it states "the vicinage" instead of "his vicinage."

The Virginia Convention, though less clear in its reference to Blackstone, also suggests a deliberate concern over assistance of counsel. The drafting of the Bill of Rights in Virginia was in the hands of George Mason,[22] who had inserted in his pioneer 1776 draft of the Virginia Declaration of Rights important safeguards in criminal proceedings but had omitted to provide for assistance of counsel.[23] Mason apparently became aware of the defect, for when he was appointed to draw the proposed Virginia Bill of Rights he included as a suggested Eighth Article[24] the following provision:

> "8th. That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and to be *admitted counsel in his favor*, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces in time of actual war, invasion or rebellion;) nor can he be compelled to give evidence against himself."

We cannot now tell exactly what Mason meant by the phrase "to be *admitted* counsel in his favor." Perhaps he meant nothing more than the accused should be *permitted* counsel, although the phrase in the eighteenth century lent itself equally well to an interpretation that the accused shall be *granted*[25] counsel in his favor. Whatever Mason may have meant, the Convention as a whole (perhaps affected by Blackstone) was not satisfied with his wording.

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[22] K. M. Howland, *Life of George Mason, supra,* Vol. II, pp. 444, 446. See also John Adams Diary for June 23, 1779, reprinted C. F. Adams, *Works of John Adams* (Boston 1851), Vol. III, p. 220.

[23] K. M. Howland, *Life of George Mason, supra,* Vol. I, pp. 229, 237, 240, 437, 440.

[24] *Ibid.,* Vol. II, pp. 444, 446.

[25] See Oxford English Dictionary, Vol. I, p. 121, under "Admit," meaning I, 2, a.

It changed Mason's phrase from a provision that the accused should be "*admitted* counsel in his favor" to a provision that he should be "*allowed* counsel in his favor." With this change [26] the Virginia proposal was adopted [27] in the following form:

> "8th. That, in all criminal and capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial [illegible] of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces;) nor can he be compelled to give evidence against himself."

The phrase "be allowed counsel" here seems to mean to be assigned counsel as one's right under the law or as appropriate to his needs.[28]

The Virginia, Pennsylvania and other proposals for a Federal Bill of Rights came before the First Congress. We do not, of course, have a complete transcript of the proceedings. But, from correspondence and other sources, we can fairly gauge the atmosphere in which the debates occurred. One important element that we know affected Congressional consideration of the Bill of Rights was the history of the various State conventions just described. Another element was the influence of French ideas upon Americans and of American ideas upon Frenchmen. Thomas Jefferson had written from Paris about the progress and text of the French Declaration of Rights to Thomas Paine, July 11, 1789,[29] to John Jay, July 19, 1789 [30]

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[26] There are a few other insignificant changes.

[27] Elliot's *Debates,* Vol. III, p. 658.

[28] See Oxford English Dictionary, Vol. I, p. 239, under "Allow," meaning IV, 11 and 12.

[29] *Writings of Thomas Jefferson* (ed. H. A. Washington, Philadelphia 1871), Vol. III, p. 69.

[30] *Ibid.,* Vol. III, p. 72.

and to James Madison, August 28, 1789.[31] We do not know what other French correspondents may have sent, but from the letters just cited we do know Jefferson sent copies of drafts of the proposed French Declaration of Rights and it would be only natural if reference were also made by Jefferson or other correspondents to the contemporary "cahiers" or instructions given by the different French constituencies to their delegates assembled at the Etats-Généraux to draw up a Declaration of the Rights of Man. Among those instructions we now know[32] there was one from La Rochelle which said "Let counsel be assigned to the accused in all cases and from the beginning of the examination."[33] And from Paris and Vannes came the suggestion that "a judicial defender shall be assigned him from the beginning of the criminal action."[34]

Whether these particular cahiers were or were not known on this side of the Atlantic, it is clear that that part of the Sixth Amendment which guarantees the accused in criminal prosecutions "the assistance of counsel" was not inserted in the Bill of Rights thoughtlessly by an inattentive Congress. The phrase was used in the draft Bill of Rights proposed by James Madison, June 8, 1789 [1 Annals of Congress, p. 435] which after some changes in committee and on the floor [1 Annals of Congress 756] passed the House of Representatives August 21, 1789 [1 Annals of Congress 767; 1 House Journal 85]. But it appears to have been deleted in the version which passed the Senate September 9, 1789 [1 Senate Journal 77; 1 Annals of Con-

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[31] *Ibid.*, Vol. III, p. 96. See the effect of this letter on Madison, *Writings of James Madison* (Philadelphia 1865), Vol. 1, p. 492, Letter to E. Pendleton, Sept. 23, 1789.

[32] A. Esmein, *A History of Continental Criminal Procedure* (translated by John Simpson, Boston 1913), p. 398.

[33] La Rochelle, Cahier du Tiers, III, 161.

[34] City of Paris, Cahier du Clergé, I, 159; Vannes, Cahier du Tiers, III, 161-162.

gress 77]. The House on September 24th insisted on including the phrase [1 Annals of Congress 913; 1 House Journal 121; 1 Senate Journal 87]; and the next day the Senate yielded [1 Senate Journal 88]. Thus the provision was a deliberate choice made against a background of convention debate, international discussion and above all law-book learning regarding English procedure in treason trials, all of which make it highly probable that what was intended was that in a criminal prosecution the accused should have from the beginning of the proceedings counsel selected by him, or if he were indigent, assigned by the court to aid him in pleading. To carry out this intention Congress used an apt expression. The phrase "assistance of counsel" would normally [35] mean "the help afforded by counsel." And the phrase "enjoy the right" would normally mean that the accused would actually possess, use or experience the right.[36]

Thus, the historical background of the Sixth Amendment no less than the decisions of this Court support our contention that the Constitution is violated when a person is arraigned on a serious criminal charge without being offered the assistance of counsel.

F. Modern Authorities Generally Support the Right of An Accused to Counsel Prior to Arraignment.

In addition to precedents in this Court and the historical background of the Sixth Amendment, we rely to some extent upon a rule of criminal procedure so widely adopted by modern authorities that it "reflects if it does not estab-

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[35] See Oxford English Dictionary, Vol. I, p. 511, under "Assistance," meaning III. Note that meaning I apparently became obsolete in the 17th Century, as the word when used in that sense thereafter is placed in quotation marks.

[36] See Oxford English Dictionary, Vol. III, p. 188, under "Enjoy," meaning III.

lish, the right to have counsel appointed, at least in cases like the present." *Powell* v. *Alabama,* 287 U. S. 45, 73.

Perhaps the clearest statement of the modern rule is to be found in the American Law Institute *Code of Criminal Procedure,* Official Draft March 16, 1931, which provides as follows:

> "Section 203. Before the defendant is arraigned on a charge of felony if he is without counsel the court shall, unless the defendant objects, assign him counsel to represent him in the cause. Counsel so assigned shall serve without cost to the defendant, and shall have free access to the defendant, in private, at all reasonable hours while acting as counsel for him. Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned him by the court. Failure to assign counsel before arraignment shall not affect the validity of any proceeding in the cause, if it appear that the defendant was subsequently represented by counsel whether assigned to him or of his own choosing and that the defendant was not in fact prejudiced by such failure."

This statement of the modern rule is not an academic invention but is buttressed by the citation of constitutional or statutory provisions in almost every state in the Union.[37]

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[37] American Law Institute, *Code of Criminal Procedure,* Official Draft March 16, 1931, pp. 630-634. See also the list of state constitutional provisions guaranteeing assistance of counsel set out in the *Index Digest of State Constitutions* (New York, 1915).

[38] California Penal Code § 987 provides:

"If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."

Without attempting to set forth *in extenso* all these provisions, it will be sufficient to quote in the margin typical statutory provisions from California [38] and New York.[39]

In the light of these constitutional and statutory provisions the prevailing opinion [40] in American State courts today is that the accused is entitled to the assistance of counsel at every stage of a criminal prosecution and that it is error to compel him to plead in the absence of counsel. However, we admit that there are some State courts which have taken the view that the accused is entitled to the assistance of counsel only if he pleads not guilty and goes to trial,[41] and that there are other State courts which have denied that under any circumstances there is a constitu-

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[39] New York Criminal Code § 188 provides:

"When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had."

New York Code of Criminal Procedure § 308 provides:

"If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel."

See interpretation of this statute in *People ex rel. Perry* v. *Berry,* 250 N. Y. 452, 454; *People* v. *Price,* 262 N. Y. 408, 413.

[40] *People* v. *Naphthaly,* 105 Cal. 641, 39 Pac. 29; *Batchelor* v. *State,* 189 Ind. 69, 125 N. E. 773; *State* v. *Moore,* 61 Kan. 732, 60 Pac. 748; *Ex parte Hollins,* 54 Okla. Crim. Rep. 70, 14 Pac. (2d) 243. The following cases indicate rather than hold that an accused has a constitutional right to the assistance of counsel before pleading: *State ex rel. Tucker* v. *Davis,* 9 Okla. Crim. Rep. 94, 130 Pac. 962; *Thomas* v. *Millis,* 117 Oh. St. 64, 157 N. E. 488. Cf. *Jackson* v. *Commonwealth,* 215 Ky. 800, 287 S. W. 17; *People* v. *Risley,* 66 How. Pr. (N. Y.) 67, 13 Abb. N. Cas. 186; *Hamilton* v. *State,* 68 Tex. Crim. 419, 153 S. W. 331; *State* v. *McNeal,* 304 Mo. 119, 262 S. W. 1025. See also *People* v. *Randazzio,* 194 N. Y. 147, 158, 87 N. E. 112. Among the law review collections of cases the best seem to be Note (1933) 17 Minn. L. Rev. 415; Note (1933) 19 Va. L. Rev. 293.

[41] *State* v. *Heyer,* 89 N. J. Law 187, 98 Atl. 413; *State* v. *Murphy,* 87 N. J. Law 515, 530, 94 Atl. 640.

tional right to have the court appoint counsel for an indigent prisoner.[42]

English law (which it will be recalled was slow to allow an accused to have counsel even if he could pay for him) is still somewhat behind American practice. Following study of the problem by a Royal Commission,[43] Parliament, while not absolutely requiring the assignment of free counsel for indigent prisoners, did authorize such assignment not merely for the conduct of a trial but also for its preparation.[44]

Supplementing this constitutional, statutory and case law, we cite in the margin as authority for the proposition that the proper practice is to assign counsel to an indigent prisoner prior to his plea certain miscellaneous authorities on criminal law.[45]

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[42] A recent survey of the state cases which take this view will be found in the Respondent's Brief, Appendix A, pp. 48-73, filed in *Johnson* v. *Zerbst*, 304 U. S. 458, October Term, 1937, No. 699.

[43] First Report of the Commission on Legal Aid for the Poor (1926) CMD 2638. Final Report of the Commission on Legal Aid for the Poor (1928) CMD 3016.

[44] *Poor Prisoners' Defense Act*, 1930, 20 and 21 Geo. V, c. 32. For the implementing regulations see Butterworth's *Twentieth Century Statutes*, Vol. 27, pp. 28-31 (1930); Vol. 28, pp. 117-118 (1931).

[45] National Commission on Law Observance and Enforcement (popularly known as the Wickersham Commission), *Report on Lawlessness in Law Enforcement*, Vol. IV, pp. 5, 7. See also the special Report annexed thereto at p. 263 et seq., prepared by Zechariah Chafee, Jr., Walter H. Pollak and Carl S. Stern, p. 281. Cf. *Criminal Justice in Cleveland* (a survey under the direction of Roscoe Pound and Felix Frankfurter (1922), p. 311; Raymond Moley, *Our Criminal Courts* (1930), p. 67; Pendleton Howard, *Criminal Justice in England* (1931), pp. 346-349; Reginald Heber Smith, *Justice and The Poor* (Carnegie Foundation for the Advancement of Teaching, 1919), pp. 111-112. See comment on *Powell* v. *Alabama*, 287 U. S. 45, in Felix Frankfurter, *Law and Politics*, "The Supreme Court Writes a Chapter on Man's Rights," p. 189. At p. 193 it is said that "Not only must there be a court free from coercion, but the accused must be *furnished* with means of presenting his defense. For this the assistance of counsel is essential. *Time for investigation* and for the production of evidence is imperative." (Italics added.) See also the

II.

Inasmuch as on its face petitioner's application states a case of unlawful imprisonment, the District Court (1) Erred in not issuing a writ of habeas corpus commanding the petitioner to be brought before the court, (2) Erred in not permitting a full, expeditious inquiry wherein the petitioner would have reasonable opportunity to present testimony in support of the application by usual methods such as examining and cross-examining witnesses and offering depositions, and (3) Erred in not finding the facts.

A. Construction of the District Court's Order.

In the case at bar the District Court entered an order denying the writ of habeas corpus (R. 25-26). From the ambiguous text [46] of the order it is possible to advance the view that the District Judge merely purported to consider the petitioner's pleadings (disregarding the respondent's

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recommendation of the *Report of the Judicial Conference*, October Session, 1940, p. 16, that provision should be made for the appointment of public defenders.

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[46] "In United States District Court

No. 22969-R

Jack Walker

vs.

James A. Johnston, Warden, U. S. Penitentiary, Alcatraz, California

Order Denying Petition for Writ of Habeas Corpus—July 10, 1939

The application for Writ of Habeas Corpus (by Order to Show Cause) came on this day to be heard. W. S. Johnston, Esq., appeared as Attorney for the Petitioner, and A. J. Zirpoli, Esq., Assistant United States Attorney, was present for the Respondent. After argument by the Attorneys, the application for a Writ of Habeas Corpus was submitted to the Court, and the Court being fully advised. It Is Ordered that said application be and the same is hereby denied, that the Order to Show Cause be discharged, and that the Petition for Writ of Habeas Corpus be and the same is hereby dismissed."

answer and annexed affidavits), and on that basis alone determined that no case for the issuance of the writ was stated. In support of this view is the fact that the District Court's order makes no reference to evidence or to the respondent's pleading and includes no specific findings. In other words, it may be that all that the Judge decided was that the application stated no cause of action. If so, then there can be no question that he erred and the proper course in the instant case is for this Court to reverse the Circuit Court of Appeals for the reasons stated in Point I of this brief.

But the limited view of the District Court's order suggested in the last paragraph does not appear to us to be sound. We believe that the court intended to deny and did deny the writ not on the narrow ground that he thought the pleading insufficient but on the ground that he considered the evidence and concluded it was against the petitioner. In support of that construction of the order are three factors: first, the District Court in this case did not dismiss the petition when filed, but instead issued a rule to show cause directing the Warden to file a return; second, the general practice in the Northern District of California (see cases cited in footnote 59, *infra*) is to try applications for habeas corpus in the same casual way that this record reveals; and third, the Ninth Circuit Court of Appeals construed the District Court's order as a combined determination of fact and of law (R. 33-34).

If, then, the true construction of the District Court's order is that it represents a determination of fact as well as of law, we submit that the court erroneously departed from the accepted, usual and essential course of judicial proceedings in habeas corpus cases. We contend that since the petitioner's application stated a cause of action the writ of habeas corpus should have issued, the petitioner

should have been brought before the court, and then there should have been a full inquiry affording the petitioner a reasonable opportunity to present testimony by usual methods such as examining and cross-examining witnesses and offering depositions.

B. Where an Application for a Writ of Habeas Corpus States on Its Face a Case of Unlawful Imprisonment, but the Facts Alleged in the Application are Challenged, the Court Must Issue the Writ, Hold a Hearing on Evidence and Find the Facts.

To avoid confusion, we emphasize that we are here concerned with a case in which (under our view) the application is good on its face as a matter of law and the only issue is whether the facts asserted in the application are true. This is not a case where the petition is bad on its face and should therefore be dismissed forthwith.[47] Nor is it a case where the petition raises a mere issue of law. If only a question of law had been raised, then the District Court would have been warranted not merely in issuing to the custodian a rule to show cause why the writ should not issue[48] but also, on the return to the order to show cause, if the decision on the point of law were adverse to the petitioner, in discharging the rule, denying the writ and dismissing the petition[49] [or, if the decision were favorable to the petitioner, in making the rule absolute and granting

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[47] R. S. § 755, U. S. C. Ti. 28 § 455; *Frank* v. *Mangum*, 237 U. S. 309, 322. See *Ex parte Milligan*, 4 Wall. 2, 110.

[48] *Ex parte Yarbrough*, 110 U. S. 651, 653; *Ex parte Royall*, 117 U. S. 241; *In re Medley*, 134 U. S. 160, 162-163; *Murdock* v. *Pollock*, 229 Fed. 392 (C. C. A. 8). See Halsbury's *Laws of England* (2d ed.), Vol. IX, ¶ 1236, p. 725; *Secretary of State for Home Affairs* v. *O'Brien* [1923], A. C. 603, 615.

[49] *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Royall*, 117 U. S. 241; *Murdock* v. *Pollock*, 229 Fed. 392.

the writ].[50] On the contrary, this is a case in which the ultimate issue is one of fact.

We contend that under these circumstances the court has two, and only two, choices. It may issue the writ immediately upon the filing of the application. Or it may first issue an order to show cause (which serves to close the pleadings and narrow the issues of fact) and then award the writ. The important principle is that where it appears that there is a disputed issue of fact, prior to the court making any determination of fact, the writ must issue and the petitioner must be brought before the court.

In support of our contention that where there are disputes of fact the prisoner must be brought before the court we rely upon the habeas corpus statutes, the view adopted in most of the Federal courts, the English practice and the paramount policy of preserving what a great legal historian has called "the most effectual protector of the liberty of the subject that any legal system has ever devised."[51]

The habeas corpus statutes speak simply and directly. Act of February 5, 1867, c. 28, 14 Stat. 385-386, as rephrased in R. S. § 755, U. S. C. Ti. 28 § 455, provides that "The court or justice to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." Act of February 5, 1867, c. 28, 14 Stat. 385, 386, as rephrased in R. S. § 758, U. S. C. Ti. 28 § 458, provides that "The person making the return shall at the same time bring the body of the party before the judge who granted the writ."

So far as we are aware, in cases where there was a dispute as to the facts this Court has never sanctioned any

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[50] *In re Medley*, 134 U. S. 160. See also this Court's order in *Ex parte Milligan*, apparently reported only at 18 L. Ed. U. S. Sup. Ct. 291. *Secretary of State for Home Affairs* v. *O'Brien* [1923] A. C. 603.

[51] Holdsworth, *History of English Law*, Vol. X, p. 658.

practice other than to issue the writ and bring the petitioner before the trial court for a full judicial inquiry.[52]

The inferior Federal courts show a diversity of opinion. The practice of bringing in the petitioner (which we believe is the only correct practice) has been generally followed in the First Circuit,[53] the Fourth Circuit,[54] the Fifth Circuit,[55] the Eighth Circuit,[56] the Court of Appeals for the District of Columbia[57] and the Middle District of Pennsylvania.[58] A contrary practice of refusing to bring the prisoner into court has been followed, with few exceptions, by the Ninth[59] and Tenth[60] Circuits and occasionally elsewhere.[61]

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[52] Observe the orders, as well as the opinions, of this Court in *Ng Fung Ho* v. *White*, 259 U. S. 276, 285, and *Chin Yow* v. *United States*, 208 U. S. 8, 13.

[53] *Wilson* v. *Lanagan*, 19 F. Supp. 870 (D. Mass.) s. c. 99 F. (2d) 544, 546 (C. C. A. 1).

[54] *Cundiff* v. *Nicholson*, 107 F. (2d) 162 (C. C. A. 4).

[55] *Farnsworth* v. *Zerbst*, 97 F. (2d) 255 (C. C. A. 5); *Irvin* v. *Zerbst*, 97 F. (2d) 257 (C. C. A. 5); *Hurt* v. *Zerbst*, 97 F. (2d) 519 (C. C. A. 5); *Brown* v. *Zerbst*, 99 F. (2d) 745 (C. C. A. 5); *Thomas* v. *Sanford*, 103 F. (2d) 887 (C. C. A. 5); *Erwin* v. *Sanford*, 27 F. Supp. 892 (N. D. Ga.).

[56] *Mothershead* v. *King*, 112 F. (2d) 1004 (C. C. A. 8).

[57] *Sanders* v. *Allen*, 100 F. (2d) 717, 719-720 (App. D. C.); *Clawans* v. *Rives*, 104 F. (2d) 240, 245 (App. D. C.).

[58] *United States ex rel. Nortner* v. *Hiatt*, 33 F. Supp. 545 (M. D. Pa.).

[59] *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9); *Cooke* v. *Swope*, 28 F. Supp. 492 (W. D. Wash.) s. c. 109 F. (2d) 955 (C. C. A. 9); *Franzen* v. *Johnston*, 111 F. (2d) 817 (C. C. A. 9); *Walker* v. *Chitty*, 112 F. (2d) 79 (C. C. A. 9). Contra: *Hall* v. *Johnston*, 103 F. (2d) 900 (C. C. A. 9).

[60] *Zahn* v. *Hudspeth*, 102 F. (2d) 759 (C. C. A. 10); *Nivens* v. *Hudspeth*, 105 F. (2d) 756 (C. C. A. 10); *McCoy* v. *Hudspeth*, 106 F. (2d) 810 (C. C. A. 10); *Wilson* v. *Hudspeth*, 106 F. (2d) 812 (C. C. A. 10); *McDonald* v. *Hudspeth*, 108 F. (2d) 943 (C. C. A. 10); *Frame* v. *Hudspeth*, 109 F. (2d) 356 (C. C. A. 10), rev'd. 309 U. S. 698; *Moore* v. *Hudspeth*, 110 F. (2d) 386 (C. C. A. 10); *Creel* v. *Hudspeth*, 110 F. (2d) 762 (C. C. A. 10); *Pers* v. *Hudspeth*, 110 F. (2d) 812 (C. C. A. 10); *Blood* v. *Hudspeth*, 113 F. (2d) 470, 472 (C. C. A. 10); *Taylor* v. *Hudspeth*, 113 F. (2d) 825, 826 (C. C. A. 10); *Bugg* v. *Hudspeth*, 113 F. (2d) 260 (C. C. A. 10). Contra: *Levine* v. *Hudspeth*, 102 F. (2d) 691 (C. C. A. 10); *Buckner* v. *Hudspeth*, 105 F. (2d) 396 (C. C. A. 10).

[61] *United States ex rel. Lesser* v. *People of the State of New York*, 34 F. Supp. 730, 733 (W. D. N. Y.). [The point, however, seems not to have been pressed.]

In England it is settled that when, through a rule to show cause or otherwise, the court learns that the right of the petitioner ultimately to be discharged from custody turns on a question of fact, the court "has no jurisdiction to make a final order"[62] until it has awarded the writ and brought the petitioner before the court,[63] or in exceptional cases before a master specially appointed to find the facts.[64]

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[62] Halsbury's Laws of England (2d ed.) Vol. IX p. 726 note (t).

[63] *Re Bussell Infants,* 63 Solicitors Journal 835 (1919) Mr. Bussell applied by summons supported by an affidavit for a writ of habeas corpus *ad subjiciendum* to secure the release of his children from the custody of their mother. The affidavit set out that the mother was not a fit and proper person to have their absolute control because she was likely to neglect their education. Mrs. Bussell filed an affidavit denying the allegations of her husband. "Upon the hearing of the summons, Roche J. ordered (*inter alia*) that the respondent [husband] should have the custody of the children.' The wife appealed on the ground that there was no jurisdiction on the hearing of a summons to make an order as if a return to the writ had been made. The facts being in dispute, the only competent order was one directing a writ to issue. * * * The Earl of Reading, C. J. [on appeal] said that the order appealed from could not stand, for it was an order finally determining the custody of the children made on disputed facts, and therefore without jurisdiction. They had not, any more than the learned judge had, sufficient facts before them to decide the point * * * the order of the learned judge should be rescinded, and a writ of habeas corpus issued instead to bring the two children up before him in chambers, when the facts could be dealt with, and he could form a proper conclusion upon all the facts."

[64] *Case of the Hottentot Venus,* 13 East 195, 104 Eng. Rep. 344 (K. B. 1810). It appeared that "A female native of South Africa, remarkable for the formation of her person, was exhibited in London in the course of the autumn of this year under the name of the Hottentot Venus * * * by certain persons who had the apparent custody of her, and who received money for such exhibition. * * * From some expressions which had been uttered by those who had brought her over to this country, and with whom she continued, and some apparent indications of reluctance on her part during her exhibition, there was reason to believe, and affidavits were accordingly laid before the Court to that effect by the secretary of a society, denominated the African Institution, that she was brought to * * * [England] and since kept in custody and exhibited * * * against her consent."

The Court issued a rule nisi to show cause why a writ of habeas corpus should not issue. It also ordered that two persons named by the coroner

We submit that the practice dictated by the statute and observed in most of the United States courts and in England is sound. In every habeas corpus proceeding there is at stake the precious right of liberty of the person. Often that right turns on legal subtleties, and then there may be no advantage in bringing the petitioner before the court. But when the question is one of fact, the case will usually turn on whether the petitioner or another is telling the truth. To decide that question without sending for the prisoner does not satisfy elementary standards of fair play. It would be absurd to say that the petitioner may be adequately heard through pleadings, affidavits, briefs and counsel. No sophisticated person supposes that in a so-called "hearing" based on documents a convicted prisoner has a substantial chance of overcoming the evidence of the affidavits of judges and prosecuting officials. The prisoner's only hope of being believed by a judge is to be in court in person and while there to persuade by the inherent probability of the story he tells and by his demeanor and sincerity under examination.

Against these obvious considerations of justice, the respondent in the case at bar may urge (a) that it would be inconvenient to bring prisoners to the bar in every habeas corpus proceeding where there is an issue of fact, or (b) that R. S. § 761, U. S. C. Ti. 28 § 461, makes it unnecessary to issue the writ, or (c) that in this case the procedural

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and attorney should examine the South African in the absence of her custodians.

"Such examination took place accordingly before the coroner and attorney of the Court who made his report thereof; from whence it satisfactorily appeared to the Court that the woman came over here, and was exhibited, by her own consent."

The Court thereupon discharged the rule.

It is worth noting that the practice of appointing a master before whom the prisoner can appear is not unknown in the courts of the United States. Ex parte Sharp, 33 F. Supp. 464, 465 (D. Kan.).

point has not been seasonably and properly invoked. If these objections are presented, they are without merit.

The objection that it is inconvenient for the warden to bring prisoners before the court appears in the opinion of the Circuit Court of Appeals for the Ninth Circuit in this case (R. 33-34). We somewhat doubt whether the alleged inconvenience is so great as is supposed. Judge Underwood, sitting alone in the Northern District of Georgia where the United States Penitentiary at Atlanta is located, has not found it impossible to handle petitions for habeas corpus by awarding the writ and inquiring into the facts on a full hearing. See cases cited in footnote 55, *supra*. But even if the inconvenience were so great as is asserted, justice is not a mere matter of convenience. Most persons who are called to interrupt their regular work to respond to summons, petitions, declarations, complaints, miscellaneous pleadings or official inquiries, do not find it convenient to respond and produce. "Lawsuits also often prove to have been groundless, but no way has been discovered of relieving a defendant from the necessity of trial to establish the facts." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52.

An objection based on R. S. § 761, U. S. C. Ti. 28, § 461, also is unavailing. The objection ignores the words of the section, its context in the statute of which it was originally a part and the English statute upon which the section is based.

R. S. § 761 provides that "The Court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." In that section there is no *express* direction as to whether to bring the petitioner to court or leave him in custody. But there is an obvious *implied* direction to bring

him into court inasmuch as the statute commands the judge to proceed "by hearing the testimony." The word "summary" does not warrant a contrary inference. As here used it means with "promptness," as this Court said in *Storti* v. *Massachusetts*, 183 U. S. 138, 143.[65]

The natural reading of the section as it now stands is reenforced by its legislative history. It was enacted as a part of the Act of February 5, 1867, c. 28, 14 Stat. 385, 386. That act provided, first, that "the judge to whom * * * application shall be made shall forthwith award a writ of habeas corpus"; then, that "the person in whose custody the party is detained * * * shall make return of said writ and bring the party before the judge"; next, that "the petitioner may deny any of the material facts set forth in the return"; and thereafter, that the "judge shall proceed in a summary way to determine the facts of the case by hearing testimony * * *" etc. Thus the context of R. S. § 761 makes it clear that the hearing therein provided was to follow upon, not to stand as an alternative for, the issuance of the writ of habeas corpus.

If any doubt could exist as to the proper construction of R. S. § 761, it is removed when it is realized that its text is obviously based upon and directed at the same evil as was the English Habeas Corpus Act of 1816, 56 Geo. III, c. 100, § 3 [reprinted in The Complete Statutes of England, Vol. V, pp. 95, 97]. At common law and under the Habeas Corpus Act of 1679, 31 Car. II, c. 2, the writ of habeas corpus was not framed or adapted to litigate facts. The writ was intended solely to test a question of law. Therefore if on an order to show cause a gaoler answered that he held under commitment of a court of competent jurisdiction, the inquiry was closed. The truth of the plea could

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[65] See Oxford English Dictionary, Vol. IX, p. 140, under "Summary" meaning III.

not be looked into.[66] The English Habeas Corpus Act of 1816 and the United States Habeas Corpus Act of 1867 changed that rule. They specifically provided for a *judicial inquiry* of the truth of the gaoler's answer.[67] And both the English prototype[68] and the American copy[69] have been interpreted to allow a full trial on every material matter not expressly contrary to the court record on which the commitment is based.

A final possible objection is that the right of the petitioner to be brought before the court was not seasonably invoked. We contend that it was drawn to the attention of the District Court by the petition itself (R. 4) as well as by argument of counsel; and that it was raised here by the petition for certiorari, pp. 4-5.

Even if the point were not made with artistry,[70] this Court has indicated that in a habeas corpus proceeding it will notice a plain and serious error although not properly assigned. *Mahler* v. *Eby*, 264 U. S. 32, 45; *Kessler* v.

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[66] Holdsworth, *History of English Law*, Vol. IX, pp. 119-120, quotes the following at p. 120, note 2, from the answers Chief Justice Wilmot gave to Parliament in 1751 when it was considering one of the bills which ultimately led to the Habeas Corpus Act of 1816:

"The Court says, 'Tell us the reason why you confine him.' The Court will determine whether it is a good or bad reason; but not whether it is a true or false one. The judges are not competent to this enquiry; it is not their province, but the province of a jury to determine it. * * * The writ is not framed or adapted to litigatory facts: it is a summary short way of taking the opinion of the Court upon a matter of law."

[67] *Johnson* v. *Zerbst*, 304 U. S. 458, 466; *Frank* v. *Mangum*, 237 U. S. 309, 330.

[68] *Re Turner* (1846), 15 L. J. (M. C.) 140. See Holdsworth, *supra*, p. 121.

[69] *Johnston* v. *Zerbst*, 304 U. S. 458, 466 note 18. *In re Mayfield*, 141 U. S. 107, 116.

[70] The tolerant attitude of this Court toward procedural irregularities by petitioners for habeas corpus has already been noted. See *Cox* v. *Hakes*, *supra*. See also Mr. Justice Holmes in *Chin Yow* v. *United States*, 208 U. S. 8, 11. "We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer."

Strecker, 307 U. S. 22, 34. Surely such notice is deserved in a situation where, under the English view, the District Court for the Northern District of California did not even have jurisdiction to act upon the petitioner's application without bringing him into court. *Re Bussell, Infants,* 63 Solicitors Journal 835. If, as Halsbury's *Laws of England* (2d ed.), Vol. IX, p. 726, note (t) asserts, the defect is truly jurisdictional, then this Court is not only free, but actually bound *sua sponte,* to notice the defect. *Clark* v. *Paul Gray,* 306 U. S. 583; *KVOS* v. *Associated Press,* 299 U. S. 269.

Since, in our view, because of the District Court's failure to issue the writ and call the petitioner to the bar the judgment below must in any event be reversed, it may, speaking strictly, be unnecessary for us to address our arguments to two additional questions: first, what type of evidence is admissible in the District Court after the writ has issued; and second, what form of judicial determination is requisite. However, although argument by us is unnecessary, we submit that directions by this Court would be salutary in the light of the deplorable practice now followed in the Ninth and Tenth Circuits where these issues are tried solely on affidavits and result in no explicit findings of fact by the District Courts. See footnotes 59 and 60, *supra.*

As to the type of evidence, we can find no valid reason for distinguishing this civil proceeding (see footnote 3, *supra*) from any other civil proceeding. The petitioner is entitled to a full judicial inquiry.[71] He has a statutory right to require the attendance of any witness living in the

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[71] *Moore* v. *Dempsey,* 261 U. S. 86, 92. See *Frame* v. *Hudspeth,* 309 U. S. 698; *Johnson* v. *Zerbst,* 304 U. S. 458, 469; *Ng Fung Ho* v. *White,* 259 U. S. 276, 285; *Frank* v. *Mangum,* 237 U. S. 309, 331, and Holmes, J., dissenting at p. 345; *Chin Yow* v. *United States,* 208 U. S. 8, 13; *Hurt* v. *Zerbst,* 97 F. (2d) 519 (C. C. A. 5); *Clawans* v. *Rives,* 104 F. (2d) 240, 245 (App. D. C.); *Mothershead* v. *King,* 112 F. (2d) 1004 (C. C. A. 8); *Wilson* v. *Lanagan,* 19 F. Supp. 870 (D. Mass.), aff'd. 99 F. (2d) 544, 546 (C. C. A. 1).

district or at a place not greater than one hundred miles from the place of holding court.[72] And he also has a right to take depositions in appropriate cases.[73] Such evidence will not interfere with the "summary" or expeditious nature of the proceedings. To be sure, as Bratton, C. J., has said, summons and depositions will interfere with the work of some of his brethren and some officials of the Department of Justice. [See *Blood* v. *Hudspeth*, 113 F. (2d) 470 (C. C. A. 10).] But judges are no more exempt from answering relevant questions in an appropriate inquiry than are business executives and cabinet officers. (*Morgan* v. *United States*, 298 U. S. 468, 482.) Courts exist to preserve the liberty of the litigant, not the liberty of the judge.

In connection with evidence questions, one difficult point which may arise is the right of either party to rely upon affidavits. Although the English Habeas Corpus Act of 1816, 56 Geo. III, c. 100, § 3, specifically provided for affidavits,[74] the American statute which in general copies the English statute does not so provide. It may, therefore, be inferred that Congress did not intend to allow proof by affidavit. At any rate, the impropriety of using affidavits in habeas corpus cases in this country has been vigorously stressed by former leaders of this bar,[75] so far as we know without disapproval of this Court. Moreover, whatever may have been the necessity for relying on affidavits before deposi-

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[72] Act of September 19, 1922, c. 344, 42 Stat. 848, U. S. C. Ti. 28 § 654. See also Rules of Civil Procedure, Rule 45(e).

[73] Rules of Civil Procedure, Rules 26-32, 45.

[74] Affidavits were used in *Ex parte Beeching*, 4 Barnewall & Creswell 136, 107 Eng. Rep. 1010. But where the issue of fact is acute it does not appear that this practice is followed. *Re Bussell, Infants*, 63 Solicitors Journal 835 (1919); *Re Turner* (1846), 15 L. J. (M. C.) 140.

[75] See argument of Joseph H. Choate, Esq., and James C. Carter, Esq., before this Court in *In re Neagle*, 135 U. S. 1, 23, 25. "The single question is to be fully tried, not upon affidavits, but upon testimony."

tions could be compelled, the need today has disappeared.[76] And, obviously, it is fairer and more likely to elicit the truth if distant persons are examined by both adversaries instead of *ex parte*.

As to the form which the District Court's determination should take, it is sufficient to refer to the oft-repeated admonition of this Court that when there is a question of fact at issue in a habeas corpus proceeding the trial court should make explicit findings of fact (*Johnson* v. *Zerbst*, 304 U. S. 458, *Moore* v. *Dempsey*, 261 U. S. 86, 92. See also *Frame* v. *Hudspeth*, 309 U. S. 698) and should not tell the clerk to enter an unsigned order as was done in the case at bar.

Conclusion.

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be reversed; and the case should be remanded to the District Court with instructions that that court should issue a writ of habeas corpus *ad subjiciendum*, should afford petitioner a full opportunity to present evidence and should specifically find the facts.

Respectfully submitted,

CHARLES E. WYZANSKI, JR.

December 1940.

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[76] For the practice of taking depositions see *Irvin* v. *Zerbst*, 97 F. (2d) 257 (C. C. A. 5). Interrogatories were used in *Wilson* v. *Lanagan*, 19 F. Supp. 870 (D. Mass.), aff'd. 99 F.(2d) 544, 546 (C. C. A. 1). As *Irvin* v. *Zerbst* points out—since habeas corpus is not a criminal proceeding, confrontation is unnecessary.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 173

JACK WALKER, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

On April 14, 1936, an indictment in two counts was returned against the petitioner and another in the District Court for the Northern District of Texas. The first count charged robbery of a national bank by force and violence and by putting certain employees in fear. The second count charged the defendants with using a dangerous weapon in committing the offense described in the first count (R. 12–15). After the jury was sworn and the indictment read the petitioner, on April 28, 1936, entered a plea of guilty (R. 16). On May

1, 1936, the petitioner was sentenced to imprisonment for 12 years (R. 18) and is now confined at the United States Penitentiary at Alcatraz, California (R. 24–25).

On March 28, 1939, the petitioner filed in the District Court for the Northern District of California a petition for writ of habeas corpus in which he alleged that he was deprived of his liberty in violation of the Sixth Amendment because he did not know that he was entitled to counsel when the proceedings under the indictment took place, was not so advised by the trial court, and did not waive such right (R. 3–6). Attached to the petition were the indictment, judgment and sentence, and the commitment (R. 7). The District Court entered an order to show cause why the writ of habeas corpus should not be issued as prayed and copies of this order were served upon the respondent and upon the United States Attorney for the Northern District of California (R. 9). A return was filed on behalf of the respondent (R. 10–11) to which there was annexed and made part thereof as exhibits, among other papers, three affidavits, one by the United States Attorney for the Northern District of Texas, another by an Assistant United States Attorney for that District who aided in the prosecution of petitioner, and the third by a United States probation officer who at the time of the criminal proceedings against the petitioner was a Deputy Marshal for the Northern District of Texas

(R. 26–31). These affidavits, which are summarized at some length in the opinion of the Circuit Court of Appeals (R. 50–51), stated, in effect, that the petitioner told each affiant that he was guilty and did not want an attorney.

Following the filing of this return the District Court appointed counsel for the petitioner (R. 32). This attorney signed and filed on behalf of the petitioner an answer to the respondent's return (R. 33–37), also summarized at considerable length in the opinion of the Circuit Court of Appeals (R. 50–51). In this answer the petitioner contradicted the allegations contained in the affidavits annexed to the return respecting the petitioner's alleged waiver of counsel and made other allegations with reference thereto. Annexed to the answer and made a part thereof as an exhibit was a letter from the Deputy Clerk of the court which sentenced petitioner relating to the practice followed in connection with the appointment of counsel for indigent defendants (R. 38). After a hearing at which counsel for the petitioner was present and submitted argument, the District Court denied the application for writ of habeas corpus, discharged the order to show cause, and dismissed the petition (R. 39). An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit (R. 40–43), which unanimously affirmed the order of the District Court (R. 49–54) and denied a petition for rehearing (R. 55).

It is contended by the petitioner that the procedure followed by the District Court was contrary to that prescribed by the provisions of R. S. 755 (U. S. C., Title 28, Sec. 455). This section provides that "The court, or justice, or judge to whom such application [application for writ of habeas corpus] is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." The petitioner argues that the writ should have issued because of the allegations in his petition and the subsequent controversy as to the facts involving his alleged waiver of the assistance of counsel arising from the return to the order to show cause and his answer thereto. The petitioner asserts, in effect, that because of the failure of the District Court to issue the writ he was deprived of the opportunity of appearing in court and of testifying and of cross-examining those who submitted the affidavits in support of the Government's claim of waiver. (See R. S. 756–761, U. S. C., Title 28, Secs. 456–461).

However, it has been often recognized that notwithstanding the peremptory language of R. S. 755, the courts are not deprived of discretion as to the time and mode in which they may exercise the powers conferred upon them and that they may consequently, in the exercise of their discretion, proceed to inquire into the legality of the petitioner's detention by the issuance of a rule upon the petitioner's custodian to show cause why the writ should not be

issued. *Ex parte Yarbrough,* 110 U. S. 651, 653; *Ex parte Royall,* 117 U. S. 241, 250–251; *Nivens* v. *Hudspeth,* 105 F. (2d) 756, 759 (C. C. A. 10th); *Murdock* v. *Pollock,* 229 Fed. 392, 393 (C. C. A. 8th); *Ex parte Collins,* 154 Fed. 980, 982–983 (C. C. Cal.), affirmed, 214 U. S. 113. The petitioner in the instant case has made no showing that the District Court abused its discretion by proceeding initially upon an order to show cause. Obviously upon the basis of the very general allegations in the petition for writ of habeas corpus (R. 5) the District Court was not in a position to determine whether the petitioner did or did not waive the assistance of counsel. Since, therefore, the issuance of the writ would not have resulted in the immediate discharge of the petitioner, the court was not required to issue it forthwith and was entitled to postpone consideration of the question as to whether the writ should ultimately be granted until it had received further light. Cf. *Ex parte Milligan,* 4 Wall. 2, 110–111; *Ex parte Royall, supra,* at p. 250, and other cases heretofore cited.

With reference to the petitioner's contention that in view of the issues made by the petition, the return to the order to show cause and the answer thereto, the writ should have been granted and a full hearing had upon those issues, we submit that the petitioner is not in a position to complain of the procedure which the District Court followed. As we have heretofore shown, petitioner was represented by counsel at all stages of the habeas corpus

proceeding following the filing of the return, and counsel was present and participated in the hearing and arguments which took place prior to the denial of the petition. At no time did petitioner's counsel present to the District Court any objection to the disposition by the court of the case upon the basis of the pleadings, accompanying exhibits, and argument. It may therefore be assumed that petitioner and his counsel fully acquiesced in the procedure followed and felt that nothing could be gained by the issuance of the writ and the holding of a further hearing. The District Court should not, of course, be put in error for following a procedure to which no objection was made on behalf of the petitioner.

There can be no doubt that, as was held by the Circuit Court of Appeals (R. 53), the District Court was justified in holding that the petitioner had waived the assistance of counsel.

The petition presents no question requiring review by this Court and therefore should, we respectfully submit, be denied.

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SEPTEMBER 1940.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 173

JACK WALKER, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The District Court dismissed the petition for writ of habeas corpus and discharged the order to show cause without opinion (R. 25–26). The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 109 F. (2d) 436.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 6, 1940 (R. 34–35) and a petition for rehearing was denied on March 7 (R. 35). The time within which to petition for writ of certiorari was extended 30 days from June 7, 1940, by

order of Mr. Justice Douglas dated May 14 (R. 35). The petition for a writ of certiorari was filed June 22, 1940 (R. 36) and was granted October 28, 1940 (R. 35). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner, indicted under U. S. C., Title 12, Section 588b for robbing a bank and putting in jeopardy the lives of its officers with a sawed-off shotgun, pleaded guilty and was sentenced to the penitentiary for 12 years. He filed this petition for habeas corpus, claiming that the judgment and sentence under which he is detained are void because he was denied the right to counsel, in violation of the Sixth Amendment. The District Court issued a rule to show cause why the writ should not issue. The respondent filed a return and the petitioner filed an answer traversing the return and alleging new facts.

The question presented is whether the facts alleged in the petition and the traverse and in the uncontradicted allegations of the return entitle the petitioner to the issuance of the writ. Three issues are involved:

(1) Whether the acceptance of the plea of guilty without the assignment of counsel violated the Sixth Amendment, when the court was not asked to assign counsel and the need for counsel did not otherwise appear.

(2) Whether it affirmatively appears that the right to counsel was not waived.

(3) Whether the judgment and sentence may be attacked on habeas corpus, when the petitioner does not show that he was prejudiced by the lack of counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rev. Stat., Sec. 751 (U. S. C., Title 28, Sec. 451), provides:

> The Supreme Court and the district courts shall have power to issue writs of habeas corpus.

Rev. Stat., Sec. 754 (U. S. C., Title 28, Sec. 454), provides:

> Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in

writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

Rev. Stat., Sec. 755 (U. S. C., Title 28, Sec. 455), provides:

> The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

Rev. Stat., Sec. 757 (U. S. C., Title 28, Sec. 457), provides:

> The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

Rev. Stat., Sec. 758 (U. S. C., Title 28, Sec. 458), provides:

> The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

Rev. Stat., Sec. 759 (U. S. C., Title 28, Sec. 459), provides:

> When the writ is returned, a day shall be set for the hearing of the cause, not exceeding

five days thereafter, unless the party petitioning requests a longer time.

Rev. Stat., Sec. 760 (U. S. C., Title 28, Sec. 460), provides:

> The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

Rev. Stat., Sec. 761 (U. S. C., Title 28, Sec. 461), provides:

> The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

STATEMENT

On March 28, 1939, petitioner filed in the United States District Court for the Northern District of California a petition for a writ of habeas corpus, alleging that he was unlawfully imprisoned in the United States Penitentiary at Alcatraz Island, in the custody of respondent (R. 2–4).

The petition and accompanying exhibits (R. 4, 7–12) showed the following facts: Petitioner and a codefendant, White, were indicted on April 14,

1936, in the United States District Court for the Northern District of Texas. The indictment (R. 7–9) charged, in two counts, that the defendants on July 1, 1935, robbed the National Bank of Bronte, Texas, and put in jeopardy the lives of its officers with a sawed-off shotgun. On April 28, 1936, the cause was regularly called for trial, the defendants appeared, and announced themselves ready, a jury was impanelled, and the indictment was read (R. 9–10). Thereupon, the petitioner pleaded guilty and his codefendant White not guilty (R. 2, 10). Evidence was introduced, argument of counsel [1] was heard, and the case was submitted to the jury, which returned a verdict finding petitioner "guilty as charged in the indictment and as pled by him," and also finding the codefendant guilty (R. 10). On May 1, petitioner appeared in court for sentence. The record recites that "being asked by the court if he had anything to say why the sentence of the law should not be pronounced upon him," he said nothing (R. 11); that the court "being of the opinion that the said Jack Walker, alias Joe C. White, alias Jack Miller, is guilty of the offense of violating Section 588–B, Title 12, U. S. C. Annotated, as charged in the Indictment and as pled by him," imposed a sentence

[1] While the record does not say so, it clearly appears that counsel represented the codefendant White and not the petitioner (R. 10, 22).

of imprisonment in the United States Penitentiary at Leavenworth for 12 years.

The petition alleged that the judgment and sentence thus pronounced are void because the petitioner "was deprived of his liberty without having the Assistance of Counsel, because he did not waive his lawful right to counsel, * * * the trial court did not ask * * * if he wanted counsel, or instruct him that he was entitled to counsel." It further alleged that the petitioner "did not know that he was entitled to counsel unless he had the money to pay for counsel, to that effect, and therefore he could not and did not competently waive his constitutional rights for counsel" (R. 3).

Upon the filing of the petition, the District Court issued an order calling upon the respondent to show cause why a writ of habeas corpus should not be issued (R. 5). The respondent filed a return which included the indictment, minutes of the trial, sentence, minutes of the sentence, the commitment and transfer to Alcatraz and also the prison record of commitment showing that the warden of the New Mexico State penitentiary has filed a detainer against the petitioner who is wanted to finish serving a life sentence (R. 16A). It included in addition the affidavits of Clyde O. Eastus, United States Attorney for the Northern District of Texas (R. 17–18), Joe H. Jones, Assistant United States Attorney for the same district (R. 18–20), and Elmer J. Reed, the United States

Probation Officer for the same district (R. 20-21) who at the time of petitioner's conviction was the deputy marshal.

The affidavit of the United States Attorney set forth the following facts: At the time of the commission of the offense charged, petitioner had escaped from the state penitentiary of New Mexico, where he was serving a life sentence. He was brought to the Northern District of Texas from the state penitentiary upon a writ of habeas corpus *ad prosequendum*. On the date of the trial the United States Attorney explained to the petitioner that he thought that "the judge would give him greater consideration if he was guilty by entering a plea of guilty" (R. 18). In response to questioning, the petitioner stated that he was guilty, that he was going to plead guilty, and that he did not want an attorney. He did not, however, wish to testify for the Government against his codefendant. At the trial of his codefendant, three employees of the First National Bank of Bronte "positively identified" petitioner as "one of the two men who entered this bank with guns and held it up" (R. 17). Two weeks after the sentence was imposed the United States Attorney received a letter from the petitioner on the stationery of the Leavenworth Penitentiary in which the petitioner expressed his satisfaction with and thanks for the treatment he had received (R. 18).

The affidavit of Assistant United States Attorney Jones corroborated that of United States At-

torney Eastus in all respects and added that the petitioner stated not only to the prosecuting officers but also in open court to the judge that he was not represented by counsel, did not desire counsel appointed for him, and was pleading guilty because he was guilty. It was under those circumstances that his plea of guilty was accepted (R. 19–20).

Probation Officer Reed deposed that on April 25 and 26, 1936, he transferred the petitioner from the New Mexico State Penitentiary to San Angelo, Texas. While making this trip the petitioner talked about the charge and said that he was guilty, that he was going to plead guilty, and that he had no intention of using a lawyer as he did not think that a lawyer would do him any good. He heard the petitioner make similar statements later to the prosecuting attorneys. After the plea and sentence, when he was returning the petitioner to jail, the petitioner said that he was "perfectly satisfied and that he felt he had got a break as he had traded them 99 years for 12" (R. 21).

Upon the filing of the return, the District Court appointed an attorney who prepared and signed an answer, which the petitioner verified. The answer specifically denied the statements in the affidavits to the effect that petitioner had said that he was guilty, that he was pleading guilty because he was guilty, and that he did not want an attorney (R. 22). It generally denied "the allegations contained in said affidavits to the effect that peti-

tioner made statements and admissions as set forth in said affidavits," except to the extent that they were specifically dealt with. It alleged that "petitioner had no information or belief sufficient to enable him to answer the allegations contained in said affidavits to the effect that petitioner wrote a letter from the United States Penitentiary at Leavenworth, Kansas, to said affiant or any of them, and basing his denial upon such lack of information or belief" denied that he had written the letter (R. 23). It also denied that the petitioner was guilty of the crime charged and that he was shown to be guilty by the evidence at the trial of his codefendant and alleged "that he is not guilty of the crimes charged in said indictment, or either of them."

In addition to making these denials the answer affirmatively alleged:

Petitioner first learned that he was to be prosecuted for the crimes charged in the indictment on April 26, 1936, when he was transferred from the New Mexico State Penitentiary to the place of trial. After he arrived at San Angelo he was approached by United States Attorney Eastus in the presence of Assistant United States Attorney Reed and other persons, and asked to plead guilty. He replied that he intended to plead not guilty. Thereupon the United States Attorney exhibited "certain pictures of the scene of said alleged crimes and by means of them and otherwise sought to persuade petitioner

that petitioner would be proved guilty at the trial." He refused to talk to the United States Attorney any further but shortly before the trial the United States Attorney came to him again and at this time petitioner asked for a continuance so that he could communicate with his relatives and try to obtain money to enable him to hire an attorney for his defense. The United States Attorney said that this was not possible and told the petitioner to plead guilty, warning him that otherwise he would be sentenced to double the term that he would receive if he pleaded guilty. Petitioner, who had no relatives, friends or acquaintances in or near San Angelo, Texas, other than his co-defendant, White, then asked the United States Attorney if he could talk to White or to the latter's attorney. This request was denied and "thereupon and because of said warning and in fear of a prison term of more than 12 years" he told the United States Attorney that he would plead guilty (R. 22–23).

In amplification of the statements made in the petition, the answer alleged that at no time was petitioner informed, or did he know or believe that he was entitled to the assistance of counsel without the money to pay for it; that he was without money; that he had attended school only through the fifth grade; that he was entirely unversed in law and was unable and unqualified to represent or act for himself; that he was not asked to waive his right to the assistance of counsel and that he did not in any

manner state or indicate that he waived or intended to waive his right (R. 23).

Finally, the answer incorporated a letter from the deputy clerk of the United States District Court for the Northern District of Texas which in reply to petitioner's inquiry stated that "there is no waiver on file showing you forfeited your right to have an attorney" and that the "writer was not in the courtroom when your case was called, and I, of course, do not know just what was said by you, but it has not been the practice or custom to appoint an attorney to defend unless a plea of not guilty is entered, and it is shown that the defendant is unable to employ an attorney" (R. 25).

The District Court after hearing the argument of counsel dismissed the petition for a writ of habeas corpus and discharged the order to show cause (R. 25–26). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was unanimously affirmed (R. 30–35).

The Circuit Court of Appeals held that the District Court properly issued a rule to show cause to explore petitioner's right to a writ of habeas corpus without disturbing his custody; that "the effect of the procedure is to require petitioner to submit whatever evidence he has with his petition or with his traverse to the return to the order to show cause"; that the only evidence supporting petitioner's contention that he did not waive his right to counsel consists of his own statements and it is not

contended that petitioner has any other evidence to submit; that the affidavits accompanying the return show that petitioner waived the right to counsel by stating that he did not want an attorney; and, finally, that the District Court was not required to believe the petitioner's denial that he had made this statement.

SUMMARY OF ARGUMENT

The Government concedes that petitioner's right to the issuance of the writ of habeas corpus must be tested by the allegations of the petition and traverse and the uncontradicted or irrefutable allegation of the return. We contend, however, that on these allegations no case was made for the issuance of the writ. We argue first, that when the petitioner appeared in court upon the arraignment and pleaded guilty he did not request the assistance of counsel and it was not otherwise apparent that he was in need of counsel; second, that the right to counsel was waived; and third, that the petitioner was not in need of counsel and, therefore, cannot challenge the judgment, at least on collateral attack.

I

Neither the Fifth nor the Sixth Amendment requires the court to assign counsel in the absence of a request, unless the defendant is in apparent need of aid. The decision in *Johnson* v. *Zerbst,* 304 U. S. 458, did not hold, and in view of the facts,

could not hold that the Sixth Amendment imposes an absolute duty on trial courts to offer to appoint counsel for all defendants who appear without representation, even though they do not request that an appointment be made. We regard it as crucial to the decision that the defendants who pleaded not guilty represented themselves at the trial; and that their need for counsel was therefore apparent to the trial court. *Powell* v. *Alabama,* 287 U. S. 45, rested on much narrower grounds. In arguing that the Constitution does not require an offer to assign counsel to an indigent defendant, in the absence of a request or an apparent need, we accord to the Sixth Amendment at least as much scope as its history supports. Even less has been thought to suffice.

The distinction between a trial and a plea of guilty as evidence of the need for counsel is the implicit basis of the many decisions since *Johnson* v. *Zerbst* which treat a voluntary plea of guilty, made without requesting counsel, as a waiver of the right. A trial judge does not accept a plea of guilty without assuring himself that it is voluntary and competent, and if it is not, the Government conceded in *Frame* v. *Hudspeth,* 309 U. S. 632, that it can be set aside. In the present case the allegations of the traverse do not establish a request for counsel or show that the plea was not voluntarily made. The sentence conformed to the

petitioner's expectation and was fair. It is not alleged that he had a defense which he was induced to forego.

II

The determinative facts establish that the right to counsel was waived. A waiver does not always require "an intentional relinquishment or abandonment of a known right" (*Johnson* v. *Zerbst*, 304 U. S. at 464). Waiver may be implied as a matter of law when reasons of extrinsic policy justify the implication. Such reasons ordinarily exist when a defendant of mature age competently and voluntarily pleads guilty without requesting counsel.

The conclusion that there was a waiver may also be sustained on a narrower ground. Petitioner did not effectively deny that two weeks after sentence he wrote to the United States Attorney expressing his satisfaction with the result and his thanks. Even though a defendant did not know and was not informed of his right to counsel, a waiver must ordinarily exist when the defendant was satisfied with the result.

III

Petitioner has not shown that he actually needed counsel. The judgment cannot therefore be collaterally attacked. Even if the Sixth Amendment is interpreted to require that all defendants

have counsel upon assignment or knowingly waive the right, it does not necessarily follow that whenever this has not occurred the judgment is void and is open to collateral attack. The concept of jurisdictional defect is not inflexible and even the availability of habeas corpus may turn on judicial discretion.

It is not enough to show that the abstract right was denied; petitioner must establish that he was in actual need of counsel either in choosing his own course or in presenting his case. Prejudice may be presumed when a defendant, without legal competence is forced to represent himself at a trial and even when a request for counsel is denied. But it cannot be implied when a defendant understandingly pleads guilty to a valid indictment; and certainly not when he is a man of mature age who has previously been convicted of crime. In the present case, the only significant complaint is that petitioner did not know and was not told of his right to counsel. Standing alone, this is insufficient.

That prejudice, measured by actual need, should have weight in determining the extent to which convictions may be collaterally attacked under the Sixth Amendment is emphasized by the tremendous number of guilty pleas in both federal and state courts. The law of many of these states does not require that a defendant be informed of the right to counsel. While it is desirable to extend the

right to be informed and to enhance the opportunities of defendants to obtain competent advice, the result can be achieved by legislation, without the cost inherent in the retroactivity of constitutional adjudication.

ARGUMENT

INTRODUCTION

A. THE PROCEDURE IN THE DISTRICT COURT

The petitioner does not contend that it was error for the District Court to issue a rule to show cause upon the filing of the petition, instead of determining from the face of the petition, whether a case was made for the issuance of the writ. The procedure has been expressly sanctioned by the decisions of this Court (*Ex parte Yarbrough,* 110 U. S. 651, 653; see *Ex parte Royall,* 117 U. S. 241; *cf. Murdock* v. *Pollock,* 229 Fed. 392 (C. C. A. 8th); *Zahn* v. *Hudspeth,* 102 F. (2d) 759 (C. C. A. 10th), certiorari denied, 307 U. S. 642) and is supported by the analogous practice of issuing a rule upon an application for leave to file an original petition for habeas corpus. (*Mooney* v. *Holohan,* 294 U. S. 103, 111.) The petitioner concedes that if, upon this preliminary inquiry on rule to show cause, it appears that he is not, as a matter of law, entitled to relief, the petition may properly be dismissed. But he contends that the office of the preliminary procedure terminates if it develops an issue of fact upon the resolution of which the petitioner's right to the writ depends.

Hence, he argues, that the judgment of the District Court, the basis of which does not appear, cannot be sustained on the grounds relied upon by the Circuit Court of Appeals.

We think the contention is well founded. The statute (Rev. Stat. Sec. 755, U. S. C., Title 28, Sec. 455) specifically provides:

> The court * * * to whom such application is made shall forthwith award a writ of habeas corpus unless it appears from the petition itself that the party is not entitled thereto.

When a rule to show cause is issued its function is to substitute for the "petition itself" the larger body of data supplied by the return and the traverse, as the basis of determining whether the writ shall issue forthwith. So long as this determination is made on the basis of the allegations of the petition and the traverse and the uncontradicted or irrefutable [2] allegations of the return, the rule to show cause procedure implements that provided by the statute without depriving the petitioner of any substantial right (Cf. *Anderson* v. *Treat*, 172 U. S. 24, 31). But the procedure does deprive the petitioner of a substantial right if it may be employed without his consent to resolve a material issue of fact, without according the petitioner an opportunity to testify in his own behalf. For if the writ were issued, the statute would accord him that right.

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[2] That the record may not be contradicted by extrinsic proof is established by *Riddle* v. *Dyche*, 262 U. S. 333.

The statute provides that upon the issuance of the writ "the person making the return shall at the same time bring the body of the party before the judge who granted the writ" (Rev. Stat. Sec. 759, U. S. C., Title 28, Sec. 459), a day shall be set for a hearing (Rev. Stat. Sec. 760, U. S. C., Title 28, Sec. 460), and the "court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require" (Rev. Stat. Sec. 761, U. S. C., Title 28, Sec. 461). That the court is to proceed "in a summary way" implies that it shall proceed promptly, and since all "the freedom of equity procedure is thus prescribed" (*Storti* v. Massachusetts, 183 U. S. 138, 143) we think the statute confers an extensive discretion as to the necessary extent of the inquiry and the evidence which may be admitted. Within the scope of that discretion, we think the hearing may be curtailed, affidavits rather than depositions [3] may be received

[3] The English Habeas Corpus Act of 1816 specifically permits the use of affidavits. 56 Geo. III, c. 100, Sec. 3; *Ex parte Beeching*, 4 B. & C. 136; see *Bell Cox* v. *Hakes and Lord Penzance*, 15 App. Cas. 506 (1890). American courts have permitted the use of affidavits without statutory authorization. *United States* v. *Williams*, 6 F. (2d) 13 (E. D. La. 1925), affirmed, 12 F. (2d) 66 (C. C. A. 5th); *Christianson* v. *Zerbst*, 89 F. (2d) 40 (C. C. A. 10th); *Moore* v. *Hudspeth*, 110 F. 2d) 386 (C. C. A. 10th), certiorari denied, 60 Sup. Ct. 1105; *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9th), certiorari denied, 60 Sup. Ct. 898; *Spann* v. *Zerbst*, 97 F. (99

and the prisoner may be heard before a master rather than in open court.[4] But when the party imprisoned relies upon his own testimony as to controverted matters within his personal knowledge we think he is entitled to an opportunity to testify[5] in support of his assertions and that he may not be limited to the statements in his application, evaluated in the light of his *a priori* credibility. We cannot contend that where these statements are not inherently fantastic, the statute which provides for a determination "by hearing

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(2d) 336 (C. C. A. 5th); *Robertson* v. *Heath*, 132 Ga. 310; *People* v. *Chezaray*, 18 Wend. 637 (N. Y. S. C. 1839). And see Wigmore, *Evidence*, Secs. 4, 1710 (3rd ed.). In any event, confrontation is unnecessary. *Irvin* v. *Zerbst*, 97 F. (2d) 257 (C. C. A. 5th), certiorari denied, 305 U. S. 597; *Harrison* v. *King*, 111 F. (2d) 420 (C. C. A. 8th).

[4] Cf. *Case of the Hottentot Venus*, 13 East 195 (K. B. 1810); *In re Tsu Tse Mee*, 81 Fed. 702 (N. D. Calif.); *In re Leopold Meyer*, 146 App. Div. 626 (1911); *Gee Fook Sing* v. *United States*, 49 Fed. 146 (C. C. A. 9th; *Ex parte Sharp*, 33 F. Supp. 464, 465 (D. Kan.).

[5] While the Act of February 5, 1867, c. 28, 14 Stat. 385, 386, preceded the removal of the common law disability of the accused to testify (Act of March 16, 1878, 20 Stat. 30, U. S. C., Title 28, Sec. 632), habeas corpus has always been recognized as a civil rather than a criminal proceeding (*Holmes* v. *Jennison*, 14 Pet. 540, 562; *Ex parte Tom Tong*, 108 U. S. 556), and the removal of the disqualification of parties in civil cases was well under way by 1867. See *Wigmore on Evidence* (3rd ed.), Secs. 576, 577. Accordingly, even if the statute were to be accorded the narrowest historical interpretation, it could not be argued that the testimony of the prisoner was beyond the contemplation of the Act.

the testimony and arguments" can fairly be interpreted to deny the right to be heard, especially when such an interpretation would necessarily weaken the efficacy of the writ of habeas corpus as an instrument for the protection of personal liberty.[6] Accordingly, although the procedure of the lower court is sanctioned by cases in the Ninth and Tenth Circuits,[7] we would make no effort to

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[6] Before the decision of this Court in *Johnson* v. *Zerbst*, the prevailing practice in habeas corpus proceedings was to resolve material issues of fact after a hearing. See, e. g., *Tiberg* v. *Warren*, 192 F. 458 (C. C. A. 9th); *United States* v. *Fowlkes*, 53 Fed. 13 (C. C. A. 3d); *United States* v. *Walker Tea*, 47 Fed. 645 (N. D. Miss.); *Campbell* v. *Waite*, 88 Fed. 102 (C. C. A. 8th); *United States* v. *Fuellhart*, 106 F. 911 (W. D. Pa.); *Ex parte Crowley*, 268 F. 1016 (D. Mass.).

A similar result is suggested by the uniform limitation upon the issuance of summary judgments to cases which present no genuine issue of fact and where there is no issue of credibility. *Fidelity & Deposit Co. of Maryland* v. *United States*, 187 U. S. 315; *Cohen* v. *11 West 42d St., Inc.*, 115 F. (2d) 531 (C. C. A. 2d); *Hanna* v. *Mitchell*, 202 App. Div. 504 (1st Dept.), affirmed, 235 N. Y. 534; *Dwan* v. *Massarene*, 199 App. Div. 872 (1st Dept.).

In other instances, less persuasive, there is authority that affidavits may be used to resolve issues of fact. Thus, with motions for new trial (*Carman* v. *State*, 208 Ind. 297; *State* v. *Dodge*, 124 Me. 243; Ariz. Rev. Code, § 5098 (1928); Tex. Rev. Crim. Stat. (1925), Crim. Practice Act, §757) and motions to withdraw pleas of guilty. *State* v. *Richardson*, 98 Mo. 564; *State v. McKeen*, 56 P. (2d) ~~1027~~ 1076 (Wash.); *People* v. *Brown*, 54 Mich. 15.

[7] *Moore* v. *Hudspeth*, 110 F. (2d) 386 (C. C. A. 10th); *Creel* v. *Hudspeth*, 110 F. (2d) 762 (C. C. A. 10th); *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9th), certiorari denied,

sustain the decision below if the issues of fact upon which the petitioner was contradicted by the responding affiants were determinative of his right to the writ.

We do contend, however, that the District Court properly dismissed the petition because the facts alleged in the petition and traverse and in the uncontradicted and irrefutable assertions of the return state no case for the issuance of the writ.

B. THE DETERMINATIVE FACTS

The determinative facts are:

Petitioner, while serving a life sentence in the State Penitentiary of New Mexico, escaped. It was charged that after his escape he committed an armed bank robbery with an accomplice. He was returned to the state penitentiary and subsequently brought to San Angelo, Texas, to answer the charge of robbery. He first learned that he was to be prosecuted on this charge when he was transferred from the penitentiary on April 25 and 26. On April 28, he appeared in court for arraignment, pleaded guilty, and after the trial of his co-

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60 Sup. Ct. 898; *Sedorko* v. *Hudspeth*, 109 F. (2d) 475 (C. C. A. 10th); *Franzeen* v. *Johnson*, 111 F. (2d) 817 (C. C. A. 9th); *Forthoffer* v. *Swope*, 103 F. (2d) 707 (C. C. A. 9th); *Lewis* v. *Johnston*, 112 F. (2d) 451 (C. C. A. 9th); *Kelley* v. *Johnson*, 111 F. (2d) 613 (C. C. A. 9th); *Taylor* v. *Hudspeth*, 113 F. (2d) 825 (C. C. A. 10th); *Zahn* v. *Hudspeth*, 102 F. (2d) 759 (C. C. A. 10th), certiorari denied, 307 U. S. 642. Almost without exception, however, the same results could and should have been reached upon the analysis, advanced hereafter in the body of this brief.

defendant, who was represented by counsel, the jury convicted him on his plea and his codefendant on the evidence. On May 1, the Court, "being of the opinion" that he was guilty of the crime charged in the indictment " and as plead by him," sentenced him to twelve years in the penitentiary.

In the interval between his arrival in San Angelo on April 26 and his plea on April 28, he talked to the United States Attorney and the Assistant United States Attorney. After stating that he intended to plead not guilty, he was shown "certain pictures of the scene" of the alleged crime and the United States Attorney sought to persuade him that he would be proved guilty at the trial. The United States Attorney also asked him to testify against his codefendant. In a second interview shortly before the trial, petitioner asked for and was refused a continuance so that he could communicate with relatives and try to obtain money to hire an attorney for his defense. He also requested and was refused an opportunity to talk with his codefendant or his codefendant's attorney. The United States Attorney again told him to plead guilty and warned him that otherwise he would be sentenced to double the term that would be imposed if he pleaded guilty. In fear of this longer term, he said that he would plead guilty.

Petitioner had no money and did not know that he was entitled to counsel unless he had the money to pay a fee. Neither the prosecuting officers nor the Court told him of this right or offered to have

counsel assigned for his aid. He had little schooling, was unversed in the law, and did not intend to waive his right to counsel.

He denies that he has knowledge sufficient to form a belief whether or not he wrote a letter to the United States Attorney two weeks after the sentence expressing his satisfaction with the result and his thanks for what the United States Attorney did for him, and, therefore, denies that he wrote the letter. He also denies that the evidence of the trial of his co-defendant showed him to be guilty of the crime charged and asserts that he is, in fact innocent. But he does not allege what the evidence at the trial was or what the facts are, which could establish his innocence. Nor does he allege that he pleaded guilty under any misapprehension as to the nature of the charge or that it was involuntary in any other sense than that he was told and feared that he would be convicted and receive a longer sentence if he elected to stand trial.

We deny that these facts state a case for the issuance of the writ. We urge, first, that when the petitioner appeared in court upon the arraignment and pleaded guilty, he did not request the assistance of counsel and it was not otherwise apparent that he was in need of counsel; second, that the right of counsel was waived, and third, that the petitioner was not in actual need of counsel and therefore cannot challenge the judgment on collateral attack.

I

Neither the Fifth Nor the Sixth Amendment Requires the Court to Assign Counsel in the Absence of a Request, Unless the Defendant is in Apparent Need of Aid.

First: Petitioner contends that the judgment and sentence based upon his plea of guilty violate the Sixth Amendment and the due-process clause of the Fifth Amendment because he was not represented by counsel and was not offered the opportunity to have counsel assigned before his arraignment and plea. To sustain this contention he relies upon the recent decisions of this Court. In our view, these decisions do not hold that the Constitution requires that counsel be assigned unless there is a request for the aid of counsel, supported by a showing of indigence, or the need for counsel otherwise appears.

Petitioner relies primarily upon *Johnson* v. *Zerbst,* 304 U. S. 458. In that case the evidence upon a habeas corpus hearing established that the petitioner and his codefendant had been arrested on November 21, 1934, charged with feloniously uttering counterfeit money. They were bound over to await the action of the grand jury and, being unable to post bail, were held in jail. January 21, 1935, they were indicted and were informed of the indictment on January 23, when they were arraigned, pleaded "not guilty," were tried, convicted, and sentenced. Although they had been

represented by counsel at the preliminary hearing—who advised them to plead guilty (Record, *Johnson* v. *Zerbst,* No. 699, October Term, 1937, p. 44)—they dismissed him and were not subsequently represented. Upon the arraignment they stated, in response to the inquiry of the Court, that they did not have counsel; and being asked whether they were ready to proceed, they answered that they were (Record, *Johnson* v. *Zerbst,* pp. 5, 21, 27–30, 41, 42). Although they were uneducated men, without legal knowledge, they attempted to defend themselves and at least one of them briefly addressed the jury. Neither the Court nor the United States Attorney told them that they might have counsel assigned for their assistance, if they were unable to pay an attorney. Immediately after the trial, they were remanded to jail where they asked the jailer to call a lawyer for them but were not permitted to communicate with an attorney. Two days later they were taken to Atlanta and isolated for sixteen days during which they saw only officers of the institution. On May 15, they filed applications for appeal which were denied because filed too late. There was a conflict between their testimony and that of the United States Attorney as to whether at the arraignment and in the presence of the judge, they asked if they could be represented by counsel; and whether, as they said, the United States Attorney replied that in the State of South Carolina the

Court did not appoint counsel unless the defendant was charged with a capital crime (Record, *Johnson* v. *Zerbst*, pp. 41, 45, 21, 23, 24, 28, 33, 39). The conflict was not resolved by the District Court.

On this evidence the District Court concluded that the petitioners' constitutional right to counsel had been infringed but held that the judgment and sentence were not void and could not be attacked collaterally on habeas corpus. "It is unfortunate," the Court said, "if petitioners lost their right to a new trial through their ignorance or negligence, but such misfortune cannot give this court jurisdiction in a habeas corpus case to review and correct the errors complained of" (*Bridwell* v. *Aderhold*, 13 F. Supp. 253, 256 (N. D. Ga.)). The Circuit Court of Appeals affirmed.

On writ of certiorari the judgment was reversed by this Court. The decision held that if the petitioners were denied the right to counsel guaranteed by the Sixth Amendment, habeas corpus is an available remedy. In support of this conclusion it was said that if "this requirement of the Sixth Amendment is not complied with, the Court no longer has jurisdiction to proceed," and that to hold that the denial of counsel is a mere irregularity would deprive the petitioners who "did not possess the requisite skill or knowledge properly to conduct an appeal" of their only effective mode of obtaining relief. But the decision did not definitively chart the incidents and scope of the right to counsel which the

Sixth Amendment guarantees. This Court did not even acquiesce in the finding of the District Court that under the circumstances of the case the right to counsel was denied (304 U. S. at 459) for the case was remanded to that court to determine whether or not the right had been waived—an issue which had not been expressly resolved.

The *Johnson* case did not hold, and in view of the facts, could not hold that the Sixth Amendment imposes an absolute duty on trial courts to offer to appoint counsel for all defendants who appear without representation even though they do not request that an appointment be made. There was, as we have said, an unresolved issue on the evidence as to whether the defendants had not expressly requested and been refused counsel. A minimal interpretation of the decision might, therefore, urge that this was the crucial point and that the case did not involve the scope of the duty to assign counsel in the absence of a request, a problem which the opinion does not even discuss. But the Government has not taken this minimal view and does not urge it here. We do regard it as crucial that the defendants pleaded not guilty; that there was a trial in which they were not represented; that they attempted unsuccessfully to obtain counsel *after* the conviction and sentence; and that they lost their right to appeal because their papers were not filed in time. From the beginning of the case to the end, the defendants denied their guilt; and

when they appeared in court and expressed their determination to proceed, their need for counsel was as patent as it could possibly have been. That the trial court must, under such circumstances, respond to the patent need by offering to provide the assistance of counsel certainly does not imply that the Constitution requires a similar response when the defendant appears in court, announces his intention to make no defense and pleads guilty.

It is true that in the *Johnson* case the opinion contains the broad statements that the "Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive the accused of his life or liberty unless he has or waives the assistance of counsel," (304 U. S. at 463); that "if the accused * * * is not represented by counsel, and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty" (304 U. S. at 468); that the "constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel"; and, finally, that this "protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused" (304 U. S. at 465).

Taken literally, these statements undoubtedly would mean that the trial court is under a constitutional duty to offer to appoint counsel even though the accused makes no request and his need does not otherwise appear. We think, however, that it is fair to suggest that they were written "under the pressure of" the particular situation (cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 114) and that they cannot be taken literally as the precise measure of the constitutional right. For if they are to be taken literally, it is difficult to understand why it is that this Court reversed the judgment with directions to determine the issue of waiver rather than with directions to sustain the writ. There was no evidence that the petitioners had been informed of their constitutional right to have counsel assigned, that they knew of their right or that any offer had been made to obtain counsel for their assistance. Implicit in the determination, therefore, is the view that the right is subject to qualifications which were not fully described or, what is in substance the same thing, that a waiver may be found even though there was not "an intentional relinquishment or abandonment of a known right" (304 U. S. at 464). We think the whole opinion makes clear that the decision rests upon the apparent and indisputable need for counsel when defendants, asserting their innocence, proceed without legal knowledge, to try their own case, are convicted and forfeit their right to appeal.

Powell v. *Alabama,* 287 U. S. 45, upon which the petitioner also relies, certainly does not indicate that the Constitution requires the assignment of counsel in the absence of a request or of an apparent need. The tragic circumstances presented in that case need not be repeated in detail. It is enough to say that the defendants were charged with a capital crime; that they protested their innocence and were forced to immediate trial at a time when the degree of popular passion against them required reliance upon the military forces. This Court held, as one of the grounds of decision that "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was * * * a denial of due process within the meaning of the Fourteenth Amendment" (287 U. S. at 71). The ultimate basis of the decision was that in "a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corrollary from the constitutional right to be heard by counsel" (287 U. S. at 72) or, as this Court said in *Palko* v. *Connecticut,* 302 U. S. 319, 327, "that in the particular situation * * * the benefit of counsel was essential to the substance of a hearing." *Avery* v. *Alabama,* 308 U. S. 444, in which the judgment of the state court was affirmed, does not extend the principal or alter the basis upon which it rests.

We do not deny that the principle of these "due process" decisions may properly be extended to

crimes which are not capital or that the Sixth Amendment may impose a broader duty to assign counsel than this Court has thus far found in the guarantee of due process of law. But we do contend that the principle of the "due process" cases is inapplicable to the petitioner who made no defense, did not seek to be heard, and even now does not allege that he desires to make a defense; and that not even the Sixth Amendment requires an offer to appoint counsel where counsel was not requested and the need for counsel was not otherwise made clear.[8]

Second: In arguing that the Constitution does not require an offer to assign counsel to an indigent defendant, in the absence of a request or of an apparent need, we accord to the Sixth Amendment at least as much scope as its history supports.

Even less has been thought to suffice. After an extensive historical survey of the colonial practice and the early state constitutional provisions, this Court concluded in *Powell* v. *Alabama,* 287 U. S. 45, 68:

> What, then, does a hearing include. Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired *and provided* by the party asserting the right. [Italics ours.]

See also *Cooke* v. *United States,* 267 U. S. 517, 537.

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[8] *Frame* v. *Hudspeth*, 309 U. S. 632, upon which the petitioner also relies, rests upon other grounds and is discussed, *infra*, p. 41.

A similar view has been forcefully expressed by Judge Sibley, concurring in *Saylor* v. *Sanford,* 99 F. (2d) 605, 607 (C. C. A. 5th):

> The Constitution in saying that "the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence" means that if he provides himself counsel the court shall allow counsel to assist and represent the accused—a right not accorded the accused in felony cases by the common law. It has never been understood that the federal courts were bound by the Constitution to furnish accused persons with counsel * * *. There are proposals pending before Congress to provide for a public defender, and for paying lawyers to defend indigent persons in some cases. All these arrangements for the defense of poor persons are acts of mercy, perhaps justice, but they are not required by the constitutional provision and have never been supposed to be.

See also *Sanford* v. *Robbins,* 115 F. (2d) 435 (C. C. A. 5th).

This conclusion finds support in the Act of April 30, 1790 (1 Stat. 112, 118, c. 9, Sec. 29: R. S. § 1034; U. S. C., Title 18, Sec. 563), enacted after the first ten amendments had been proposed by Congress (1 Stat. 97) which provided that in prosecutions for treason and other capital crimes the court before which the accused "is tried" is required "immediately upon his request to assign to such

person such counsel, not exceeding two, as such person shall desire." It is unlikely that the duty to assign would have been thus limited if the Sixth Amendment contemplated its existence in all cases. Not until 1892 was the statute supplemented by a provision primarily directed at civil causes that the court "may request any attorney of the court to represent such poor person" and then only "if it deems the cause worthy of a trial" (Act of July 20, 1892, c. 209, § 3, 27 Stat. 252).

The conclusion is also supported by the decisions of state courts, under constitutional provisions similar to the Sixth Amendment,[9] that the right to have counsel assigned is statutory rather than constitutional. See e. g. *People* v. *Williams*, 225 Mich. 133, 137–138; *Reed* v. *State*, 143 Miss. 686, 689; *State* v. *Sweeney*, 48 S. D. 248, 251; *Sowells* v. *State*, 99 Tex. Cr. App. 465, 468; *Pardee* v. *Salt Lake County*, 39 Utah 482, 488; *State* v. *Gomez*, 89 Vt. 490, 496.

It is supported, finally, by the absence of persuasive affirmative evidence of a constitutional duty to assign. For after exhaustive research, the petitioner is able to point only to the English Treason Act of 1695 (Petitioner's Brief, p. 22) providing for assignment *on request;* and the instructions from three of the constituencies of the delegates who drew the Declaration of the Rights of Man (Petitioner's Brief, p. 26). The exceptional nature of the Treason

[9] These provisions are set forth in Appendix A, *infra*, pp. 50–52.

Act was recognized by this Court in the *Powell* case (287 U. S. at 60) and it is not without interest that the procedure it prescribed was to some extent copied by the Act of April 30, 1790, *supra*, p. 33, with an extension to other capital cases only. With respect to the "cahiers" from La Rochelle, Paris, and Vaunes, it is enough to point to the obvious fact that what was thought desirable in an inquisitorial system would not necessarily have commended itself to the architects of an accusatorial system had they known of it—and there is no evidence that they did.

If the bare historical record persuades that the Sixth Amendment contemplated the assignment of counsel, we think it clear that it does not persuade that assignment was contemplated without request. Even the Treason Act of 1695, upon which the petitioner so strongly relies, called for a request, and, except in Pennsylvania, those state courts which have pointed to their constitutions as well as to inconclusive statutes [10] in finding a duty to assign, have explicitly required a request. See, e. g. *Weatherford* v. *State*, 76 Fla. 219; *Bethune* v. *State*, 26 Ala. App. 72, certiorari denied 228 Ala. 422; *Holland* v. *Comm.* 241 Ky. 813, 817; *State* v. *Satcher*, 124 La. 1015, 1019; *State* v. *Steelman*, 318

[10] In only a minority of the states do the statutes specifically provide that when a defendant appears for arraignment, he must be advised that it is his right to be assisted by counsel. American Law Institute, Code of Criminal Procedure, Official Draft (1930) 630.

Mo. 628, 631–632; *State* v. *Raney*, 63 N. J. L. 363, 365; *Ex parte Rodriguez*, 118 Tex. Cr. App. 179, 181; *State* v. *Yoes*, 67 W. Va. 546, 547.

Most of the rights conferred by the Constitution must be claimed before they can be denied. The Court is not obliged to advise that the privilege against self-incrimination would justify a refusal to answer, even when the consequences of the answer are damaging indeed (see *Wilson* v. *United States*, 162 U. S. 613; *Powers* v. *United States*, 223 U. S. 303; *United States* v. *Block*, 88 F. (2d) 618 (C. C. A. 2d) or that the accused has a right to a speedy trial (*Worthington* v. *United States*, 1 F. (2d) 154 (C. C. A. 7th); *Phillips* v. *United States*, 201 Fed. 259 (C. C. A. 8th)).

We think that the framers did not doubt that if men were granted rights by the organic law they would have the wit and the fortitude to assert them. The thought that more may sometimes be needed to bring potential rights to the fruition of enjoyment, while the basis of much modern legislation, is not a product of the Eighteenth Century.

Third: In our view the decision in *Johnson* v. *Zerbst* goes beyond the historical record and implies that the Sixth Amendment imposes a duty to assign counsel. But we do not think that it imposes such a duty in the absence of a request or of other circumstances which serve the function of a request in making the need clear. Such circumstances may well be thought to exist in any case in

which the defendant asserts his innocence and is required to stand trial without the assistance of counsel. But they do not exist where, as in the case at bar, the defendant, upon arraignment, pleads guilty to an unquestionably valid indictment and is sentenced by a court which is satisfied of his actual guilt.

The distinction between a trial and a plea of guilty as evidence of the need for counsel is the implicit basis of the many decisions since *Johnson* v. *Zerbst* which treat a voluntary plea of guilty, made without requesting counsel, as a waiver of the right. See, e. g., *Cundiff* v. *Nicholson*, 107 F. (2d) 162 (C. C. A. 4th); *Cooke* v. *Swope*, 28 F. Supp. 492 (W. D. Wash.), affirmed, 109 F. (2d) 955 (C. C. A. 9th); *Williams* v. *Sanford*, 110 F. (2d) 527, (C. C. A. 5th), certiorari denied, 310 U. S. 643.[11] The distinction has also been supported by emphasizing that it is "for his defence" that the Constitution guarantees the right to counsel; and a defendant who pleads guilty makes no defense. See *Cooke* v. *Swope*, 28 F. Supp. 492, *supra*; *Parker* v.

[11] Accord: *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9th), certiorari denied, 310 U. S. 624; *Franzeen* v. *Johnston*, 111 F. (2d) 817, 820 (C. C. A. 9th); *Buckner* v. *Hudspeth*, 105 F. (2d) 396, 397 (C. C. A. 10th), certiorari denied, 308 U. S. 553; *McCoy* v. *Hudspeth*, 106 F. (2d) 810, 811 (C. C. A. 10th); *Wilson* v. *Hudspeth*, 106 F. (2d) 812, 813 (C. C. A. 10th); *Pers* v. *Hudspeth*, 110 F. (2d) 812, 813 (C. C. A. 10th); *Blood* v. *Hudspeth*, 113 F. (2d) 470, 471 (C. C. A. 10th); *Erwin* v. *Sanford*, 27 F. Supp. 892 (D. C. Ga.).

829, 830) *Johnson,* 29 F. Supp. ~~828, 829~~ (N. D. Cal.); *State* v. *Murphy,* 87 N. J. L. 515, 530; *State* v. *Heyer,* 89 N. J. L. 187. In Pennsylvania, the decisions requiring the accused to be advised of his right to counsel—in spite of the absence of a statute so providing (*Commonwealth* v. *Cohen,* 123 Pa. Super. 5; *Commonwealth* v. *Valerio,* 118 Pa. Super. 34)—have recently been held inapplicable to a defendant who pleads guilty. *Commonwealth ex rel. Curtis* v. *Ashe,* 139 Pa. Super. 417; *Commonwealth ex rel. Campbell* v. *Ashe,* 15 Atl. (2d) 409. The same distinction has been taken in other states in the application of the assignment statutes. See, e. g., *State* v. *Murphy, supra; State* v. *Heyer, supra; People* v. *Williams,* 225 Mich. 133. A trial judge does not accept a plea of guilty without assuring himself that it is voluntary and competent and if the plea is involuntary or incompetent the Government conceded in *Frame* v. *Hudspeth,* 309 U. S. 632, that it can be set aside. See also *Sanders* v. *Allen,* 100 F. (2d) 717 (App. D. C.).

Fourth: On the determinative facts of the present case, the petitioner did not request counsel when he appeared upon the arraignment and nothing occurred in court to indicate an apparent need. Accordingly, we contend that the petitioner's rights were not infringed by failing to assign counsel or offering to do so.

The petitioner may urge in reply that the alleged occurrences before arraignment point to a need for

counsel which the United States Attorney should have called to the attention of the court; and that his rights should be considered as *if* the facts were before the Court. But even if the facts alleged had been before the Court, we think that neither a request nor a need would have been shown. That the petitioner had asked for a continuance in order to communicate with relatives in the effort to obtain funds to employ counsel would be without significance if he did not persist in the request; and by the time he came into court he had determined to plead guilty.[12] By the same token, his earlier desire to speak to his codefendant or to his co-defendant's attorney was hardly significant when, on his appearance in court, both were present and presumably continued to be during the co-defendant's trial. Moreover, he does not allege that he desired to speak to them with reference to his own defense rather than with regard to the United States Attorney's effort to induce him to testify for the Government—a possibility which is strongly suggested by the fact that he asked to see *either* his co-defendant or his attorney. If the right to counsel were denied at first and subsequently granted, the petitioner could not complain. *Saylor* v. *San-*

[12] Moreover, almost a year had elapsed between the time of the robbery charged in the indictment and his removal to stand trial. Although the petitioner alleges that he first learned that he was "to be prosecuted" on or about April 26, 1936, he does not assert that he had not previously learned of the *charges* against him (R. 22).

ford, 99 F. (2d) 605 (C. C. A. 5th). For similar reasons, the denial of his earlier requests would be of no significance if he had freely decided to plead guilty.

There remains, therefore, only the allegations that before he decided to plead guilty the United States Attorney showed him pictures of the scene of the crime, attempted to persuade him that he would be convicted, and "warned" him that, if he were, he would receive twice as severe a sentence as if he pleaded guilty, and that, because of this warning "and in fear of a prison term of more than 12 years," he agreed to plead guilty.

These allegations do not show that the plea was involuntary or establish a need for counsel, in any significant sense, at the time of the arraignment. In telling a defendant that he will receive more favorable consideration upon sentence if he pleads guilty than if he is convicted after a trial, a prosecuting officer states one of the facts of life which it is not to the disadvantage of a defendant to know. To call the statement a "warning" is to give it a bad name, but not to render its utterance inappropriate. The thought that such considerations might have weight with the sentencing judge can hardly have come as a surprise to the petitioner, who was already under a life sentence in a state penitentiary. That a plea of guilty was induced by a prosecutor's promise of leniency is not even a

ground for withdrawing the plea,[13] unless the expectations engendered are defeated by the court;[14] and if the prosecutor's statement is only a prediction it may not be withdrawn at all.[15] In the present case the sentence conformed precisely to the petitioner's expectations. It is not and could not be alleged that the sentence was excessive. It is not alleged that the petitioner had a defense which he was induced not to make. It is not even explicitly alleged that he desires now to put the Government to its proof.

Fifth: Petitioner cites *Frame's* case, 309 U. S. 632, in support of the contention that his plea of guilty does not affect his right to the writ (Brief, pp. 18–19). That decision is wholly consistent with the position we take here. The petition for habeas corpus alleged that the petitioner had pleaded guilty without the assistance of counsel at a time when he was under an adjudication of insanity and was in fact mentally incompetent. Upon the basis of the petition and the answer the

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[13] See *United States* v. *Bayaud*, 23 Fed. 721 (S. D. N. Y.); *Kidd* v. *Commonwealth*, 255 Ky. 498; *United States* v. *Denniston*, 89 F. (2d) 696 (C. C. A. 2d), certiorari denied, 301 U. S. 709.

[14] See *Kercheval* v. *United States*, 274 U. S. 220; *Myers* v. *State*, 115 Ind. 554; *State* v. *Stephens*, 71 Mo. 535; *Griffin* v. *State*, 12 Ga. App. 615; *Morgan* v. *State*, 33 Okla. Cr. 277; *State* v. *District Court*, 81 Mont. 495; *Rex* v. *Ah Tom* [1928], 2 D. L. R. 748.

[15] *State* v. *Reininghaus*, 43 Ia. 149; *State* v. *Wyckoff*, 107 N. W. 420 (Ia.), 1906.

District Court found that the petitioner had voluntarily, intelligently, and competently entered his plea of guilty. The Circuit Court of Appeals affirmed on the ground that the finding of the District Court was supported by substantial evidence, with one judge dissenting on a petition for rehearing. Upon a petition for a writ of certiorari we took the view that the statements in the record and in the answering affidavits were insufficient to show that the petitioner, who by virtue of the adjudication of insanity was presumptively insane at the time of the plea, was in fact mentally competent at that time. With the consent of the Government this Court reversed the judgment and remanded the cause to the District Court "for the purpose of making a full inquiry into the mental status of petitioner at the time he entered the pleas of guilty."

It is obvious that the disposition rested upon the ground that if the allegations of the petition were sustained, the petitioner was incompetent to plead. Cf. *Sanders* v. *Allen,* 100 F. (2d) 717 (App. D. C.). The same result follows in jurisdictions where the accused is not entitled to the assignment of counsel in non-capital cases even upon request. (Compare *Reed* v. *State,* 143 Miss. 686, 689, with *Deloach* v. *State,* 77 Miss. 691.)[16]

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[16] Compare *Weatherford* v. *State*, 76 Fla. 219, with *Eckles* v. *State*, 180 So. 764 (Fla.), in a jurisdiction where there is ordinarily no right to assignment in the absence of a request.

It is not alleged in the present case that the petitioner pleaded guilty without full understanding of the nature of the charge and the implications of the plea; and the recitations in the minutes of sentence that he remained silent when asked if there was any reason why sentence should not be pronounced [17] and that the trial court was of the opinion that the petitioner was guilty of the crimes charged (R. 11) carry assurance that the court was satisfied that the plea was competently and voluntarily made.

II

The Determinative Facts Establish That the Right to Counsel Was Waived

First: What has been said to support the contention that the Sixth Amendment confers no right to have counsel appointed in the absence of a request or an apparent need may be repeated to sustain the view that even if the right is conferred, the petitioner's voluntary plea of guilty constituted a waiver as a matter of law. A waiver may be implied as a matter of law when reasons of extrinsic policy justify the implication. Such reasons are amply furnished in the arguments that have heretofore been made. This, indeed, is the mode of analysis adopted by the Circuit Courts in the decisions to which we have referred (*supra*, p. 37). To be sure, this analysis in terms of waiver cannot

[17] *Cf. Rex* v. *Richmond*, 39 D. L. R. 117 (1918).

be sustained if a waiver always requires "an intentional relinquishment or abandonment of a known right" (*Johnson* v. *Zerbst,* 304 U. S. at 464). But for the reasons already stated we do not believe that this is its only meaning (*supra,* p. 30).

Second: The conclusion that there was a waiver may also be sustained on a narrower ground. A waiver must exist whenever the defendant is satisfied with the result, even though he did not know and was not told of his right to counsel. Unless this is so, the doctrine of *Johnson* v. *Zerbst* would lead to denying that those acquitted without counsel have "been validly acquitted and cannot be tried again." Sibley, J. in *Sanford* v. *Robbins,* 115 F. (2d) 435.

In the present case there is more than the plea of guilty and the failure to seek to withdraw it to indicate that the petitioner was satisfied with the result. The United States Attorney and the Assistant United States Attorney both stated in their affidavits that two weeks after his sentence the petitioner wrote expressing his thanks and his satisfaction with the result. In his traverse the petitioner stated that he had "no information or belief sufficient to enable him to answer" these allegations and "basing his denial upon such lack of information or belief," he denied that he had written the letter (R. 23). Since the petitioner must have known whether or not he wrote such a letter, his denial of information and belief was a

patently sham denial. It can, therefore, be disregarded. (See *Local 167* v. *United States,* 291 U. S. 293; *Dahlstrom* v. *Gemunder,* 198 N. Y. 449, 454; *Hanna* v. *Mitchell,* 202 App. Div. 504, 517–518, affirmed 235 N. Y. 534; *Wallace* v. *Bacon,* 86 Fed. 553 (S. D. Calif.); cf. *Kosztelnik* v. *Bethlehem Iron Co.,* 91 Fed. 606 (E. D. N. Y.).) Thus, the case stands on the rule to show cause with an uncontroverted allegation that petitioner, who made no effort to withdraw his plea of guilty, expressed his complete satisfaction with the judgment and sentence of the court. There is, moreover, no allegation in the petition or in the traverse that the petitioner was actually dissatisfied with the result. Under these circumstances, the determinative facts fail to show that the right to counsel was not waived. More than this, they establish that it was waived.

In *Johnson* v. *Zerbst,* this Court said that the burden of proving that there was no waiver is upon the petitioner who seeks collaterally to attack a presumptively valid judgment of a court. We agree with the petitioner's statement (Brief, p. 20) that burden of proof is irrelevant if the application for habeas corpus alleges facts which show as a matter of law that the right was denied and that no waiver occurred. But it is highly relevant insofar as it imposes the duty upon the petitioner of establishing on the rule to show cause facts which, if proved, would clearly show that there was no waiver. That burden was not sustained in the present case.

III

Petitioner Has Not Shown That He Actually Needed Counsel. The Judgment Cannot Therefore Be Collaterally Attacked

First: Even if the Sixth Amendment is interpreted, as petitioner contends, to require that all defendants have counsel upon arraignment or knowingly waive the right, we do not think it necessarily follows that whenever this has not occurred the judgment is void and is open to collateral attack. The right to counsel is guaranteed because it meets a need, not for its own sake. Accordingly, we contend that it is not enough to show that the abstract right was denied; it must also be shown that the need existed which constitutes the justification of the right. To make such a showing a petitioner must establish that he suffered from the lack of counsel either in choosing his own course or in presenting his case. Such prejudice may be readily presumed when, as in *Johnson* v. *Zerbst, supra,* a defendant, without legal competence is forced to trial without aid. It may also be readily inferred when a request for counsel was denied, since a defendant who claims the aid must usually have responded to a felt need. But it cannot be implied when a defendant understandingly pleads guilty to a valid indictment charging a serious offense, and certainly not when he is a man of mature age who has previously been convicted of crime. In such a case a conviction has not resulted from

the defendant's "own ignorance of his legal and constitutional rights" (*Johnson* v. *Zerbst*, 304 U. S. at 465). Counsel "had they been assigned could have entered no other plea than that which he himself entered, if they had dealt honestly with him and with the court." (Parker, J. in *Cundiff* v. *Nicholson*, 107 F. (2d) 162, 164 (C. C. A. 5th)). If a substantial showing of innocence were made, it might be argued that counsel could have protected the accused against his own timidity or folly. But there is no such showing here. Nor is it shown that the sentence was excessive or that facts which might have affected the sentence were not brought to the attention of the court. When all the facts are marshalled the only significant complaint is that originally alleged in the petition—that petitioner did not know and was not told of his right to counsel. We do not think this serves to bring the case within the reason of a rule which found its primary authority in decisions involving a trial which is only a sham (*Moore* v. *Dempsey*, 261 U. S. 86; cf. *Frank* v. *Mangum*, 237 U. S. 309; *Mooney* v. *Holohan*, 294 U. S. 103). This distinction between a trial which is unfair and one which is void[18] indicates that the concept of jurisdictional defect is not impervious to differences of degree. Even

[18] Compare the memorandum of Mr. Justice Holmes denying application for habeas corpus in *Sacco and Vanzetti* v. *Massachusetts*, printed in *The Sacco-Vanzetti Case* (1929), V, pp. 5516–6617.

the availability of habeas corpus may turn on judicial discretion. Cf. *Bowen* v. *Johnston,* 306 U. S. 19.[19] In the absence of genuine prejudice, we think the opportunity to apply for withdrawal of a plea of guilty, within the time provided by Rule II (4) of the Criminal Appeals Rules is an adequate remedy. Cf. *United States* v. *Norris,* 281 U. S. 619.

Second: That such consideration should have weight in determining the extent to which judgments of conviction should be subject to collateral attack is strikingly emphasized by the fact that in 1938 and 1939 more than 70,000 pleas of guilty were filed in federal courts and 38,000 for the year ending June 30, 1940. In 1938 more than 50,000 pleas of guilty were filed in the courts of 26 states,[20] in many of which the defendants were not required under state law to be informed of the right to counsel. The Government agrees that the desirable practice is that provided by the statutes of some states requiring an offer to appoint counsel upon arraignment, even on a plea of guilty.[21] In March 1937 the Attorney Gen-

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[19] See also *Harlan* v. *McGourin,* 218 U. S. 442; *Knewel* v. *Egan,* 268 U. S. 442; *McNally* v. *Hill,* 293 U. S. 131, 138–139.

[20] This data was made available to the Department by Dr. C. C. Van Vechter, Chief of the Census Bureau, Department of Commerce. The number of pleas in the federal courts for the fiscal year ending June 1940 is taken from Annual Report of the Director of the Administrative office of the United States Courts (1940), p. 85.

[21] See, e. g., Minn. Gen. Stat. (1923) § 10667. But cf. *State* v. *McDonnell,* 165 Minn. 423, 426.

eral urged that counsel be appointed "in each case in which the defendant has not retained counsel, unless he expressly states that he wishes to conduct his own defense" (Circular No. 2946); and for several years legislation has been furthered to establish a system of public defenders.[22] Such reforms can be achieved legislatively without the retroactivity of constitutional adjudication. The present case suggests that if retroactivity is essential (cf. *Montgomery Ward and Co.* v. *Duncan*, No. 30, October Term, 1940) the reforms will be achieved at a cost which may offset the gain.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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JANUARY 1941.

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[22] See Annual Report of the Attorney General (1940), pp. 7–8.

APPENDIX A

Right to Counsel Clauses in State Constitutions

Alabama (1901), Art. 1, Sec. 6: "right to be heard by himself and counsel, or either"; Arizona (1912), Art. 2, Sec. 24: "right to appear and defend in person, and by counsel"; Arkansas (1874), Art. 2, Sec. 10: "to be heard by himself and his counsel"; California (1879), Art. 1, Sec. 13: "to appear and defend, in person and with counsel"; Colorado (1876), Art. 2, Sec. 16: "to appear and defend in person and by counsel"; Connecticut (1818), Art. 1, Sec. 9: "to be heard by himself and by counsel"; Delaware (1897), Art. 1, Sec. 7: "to be heard by himself and his counsel"; Florida (1887), Preamble, Sec. 11: "shall be heard by himself or counsel or both"; Georgia (1877), Art. 1, Par. 5: "shall have the privilege and benefit of counsel"; Idaho (1890), Art. 1, Sec. 13: "to appear and defend in person and with counsel"; Illinois (1870), Art. 2, Sec. 9: "to appear and defend in person and by counsel"; Indiana (1851), Art. 1, Sec. 13: "to be heard by himself and counsel"; Iowa (1857), Art. 1, Sec. 10: "to have the assistance of counsel"; Kansas (1861), Sec. 10: "to appear and defend in person or by counsel"; Kentucky (1891), Sec. 11: "to be heard by himself and counsel"; Louisiana (1921), Art. 1, Sec. 9: "to have the assistance of counsel"; Maine (1820), Art. 1, Sec. 6: "to be heard by himself and his counsel or either at his election"; Maryland (1867), Art. 21: "to be al-

lowed counsel"; Massachusetts (1790), "to be fully heard in his defense by himself or his counsel at his election"; Michigan (1909), Art. 2, Sec. 19: "to have the assistance of counsel for his defense"; Minnesota (1857), Art. 1, Sec. 6: "to have the assistance of counsel in his defense"; Mississippi (1890), Art. 3, Sec. 26: "to be heard by himself or counsel or both"; Missouri (1875), Art. 2, Sec. 22: "to appear and defend, in person and by counsel"; Montana (1889), Art. 3, Sec. 16: "to appear and defend in person and by counsel"; Nebraska (1875), Art. 1, Sec. 11: "to appear and defend in person or by counsel"; Nevada (1864), Art. 1, Sec. 8: "to appear and defend in person and with counsel as in civil actions"; New Hampshire (1784), Part First, Art. Fifteenth: "to be fully heard in his defense by himself and counsel"; New Jersey (1844), Art. 1, Sec. 8: "to have the assistance of counsel in his defence"; New Mexico (1912), Art. 2, Sec. 14: "to appear and defend himself in person, and by counsel"; New York (1895), Art. 1, Sec. 6: "to appear and defend in person and with counsel as in civil actions"; North Carolina (1876), Art. 1, Sec. 11: "to have counsel for his defense"; North Dakota (1889), Art. 1, Sec. 13: "to appear and defend in person and with counsel"; Ohio (1851), Art. 1, Sec. 10: "to appear and defend in person and with counsel"; Oklahoma (1907), Art. 2, Sec. 20: "right to be heard by himself and counsel"; Oregon (1859), Art. 1, Sec. 11: "to be heard by himself and counsel"; Pennsylvania (1874), Art. 1, Sec. 9: "to be heard by himself and his counsel"; Rhode Island (1843), Art. 1, Sec. 10: "to have the assistance of counsel in his defense"; South Caro-

lina (1895), Art. 1, Sec. 18: "to be fully heard in his defense by himself or by his counsel or by both"; South Dakota (1889), Art. 6, Sec. 7: "to defend in person and by counsel"; Tennessee (1870), Art. 1, Sec. 9: "to be heard by himself and his counsel"; Texas (1876), Art. 1, Sec. 10: "the right of being heard by himself or counsel or both": Utah (1895), Art. 1, Sec. 12: "to appear and defend in person and by counsel"; Vermont (1793), Chap. 1, Art. 10: "to be heard by himself and his counsel"; Washington (1889), Art. 1, Sec. 22: "to appear and defend in person or by counsel"; West Virginia (1872), Art. 3, Sec. 14: "shall have the assistance of counsel"; Wisconsin (1848), Art. 1, Sec. 7: "to be heard by himself and counsel"; Wisconsin (1889), Art. 1, Sec. 10: "to defend in person and by counsel."

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SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1940.

Jack Walker, Petitioner, *vs.* James A. Johnston, Warden, United States Penitentiary, Alcatraz, California.	On ~~petition for~~ Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 10, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents important questions of practice touching the issue of the writ of *habeas corpus*. We accordingly granted certiorari *in forma pauperis*, and appointed counsel for the petitioner to insure adequate presentation at our bar.

The petitioner, who is confined in the Federal prison at Alcatraz, California, under sentence and commitment of the District Court for Northern Texas upon a plea of guilty to an indictment charging armed robbery of a national bank, sought *habeas corpus* in the District Court for Northern California. His petition recites that he was indicted in the District Court for Northern Texas March 9, 1936; that the cause came on for trial April 28, 1936, and he pleaded guilty; that he was sentenced May 1, 1936, to twelve years' imprisonment, was committed to the penitentiary at Leavenworth, Kansas, May 4, 1936, and is now confined at Alcatraz. The petition alleges that at trial the petitioner was without the assistance of counsel; that he did not waive his right to counsel; that the court did not inquire whether he desired counsel or instruct him that he was entitled to counsel; that he did not know he was so entitled if he had no money to pay an attorney; and that the judgment of conviction is void, as he was deprived of the assistance of counsel for his defence in violation of the Sixth Amendment of the Constitution. The prayer is that the writ issue and that he be released from custody.

The court issued an order to show cause addressed to the warden of the penitentiary. That officer filed a return showing that he

held the prisoner under a commitment issued by the Texas District Court and a transfer from Leavenworth to Alcatraz ordered by the Director of the Bureau of Prisons of the Department of Justice. Attached to the return were certified copies of the indictment, minute entries, sentence, and commitment, and docket entries in the cause, transfer order, and record of commitment. Also attached were affidavits of the United States Attorney, the Assistant United States Attorney, and the Probation Officer (formerly a deputy marshal) of the Northern District of Texas. These affiants, or some of them, deposed to the following effect: The petitioner was jointly indicted with one White, who pleaded not guilty, was tried, convicted, and sentenced; the petitioner had no counsel as he entered a plea of guilty. At the time of the commission of the offense for which the petitioner was indicted he was an escaped convict from the State Penitentiary of New Mexico and was brought thence for trial. On the day of the trial, the marshal brought him to the Federal building where the District Attorney talked to him; asked him whether he was guilty and he stated he was; asked him if he was going to plead guilty and he stated he was; asked him whether he had a lawyer and he stated he did not want an attorney as he thought an attorney would be of no value to him. The District Attorney explained to the petitioner that he thought the judge would give him greater consideration, if he was guilty, on his entering a plea of guilty. The petitioner was told his interviewers believed that if he would tell the judge the truth and testify in the case as to his accomplices that fact would be considered by the judge in passing sentence. The petitioner stated he would enter a plea of guilty but would not testify. He refused to say whether the co-defendant White was with him at the time of the robbery and said that he would prefer not to make a statement with respect to other facts in the case. One affiant stated his belief that petitioner told the judge in open court that he had no counsel and did not desire any as he was guilty and intended to plead guilty. Three witnesses identified the petitioner as being one of the men who entered the bank and there was no question of his guilt. After sentence, petitioner expressed his satisfaction at the length of sentence imposed. Some time later a letter was received from the petitioner thanking the District Attorney for what he had done for him.

The petitioner answered, denying that he had stated to one or more of the affiants, or in the presence of one or more of them, that he was guilty or that he intended to plead guilty; that he did not want an attorney or felt that an attorney would be of no value to him. He alleged that he first learned he was to be prosecuted for the offense in question about April 26, 1936, when a deputy marshal took him from New Mexico to Texas; that, prior to trial, the District Attorney, in the presence of the deputy marshal, asked him to plead guilty and he replied that he intended to plead not guilty, whereupon the District Attorney exhibited to him pictures of the scene of the alleged crime and, by means of them and otherwise, sought to persuade him that he would be proved guilty; that the petitioner refused to talk further with the District Attorney at that time; that the District Attorney again visited him and the petitioner then requested that the trial be continued so that he could communicate with his relatives and try to obtain money to enable him to hire an attorney for his defense, but that the District Attorney advised him this was not possible and told him to plead guilty, warning him that he would be sentenced to twice as great a term if he did not so plead; that the petitioner had no relatives or friends near the scene of the trial other than his co-defendant White. He alleged that he requested the District Attorney to be permitted to talk to White or White's attorney, but the request was refused. In view of the District Attorney's warning, and in fear of a heavy prison term, he told the District Attorney he would plead guilty. The answer alleges that petitioner has no information and belief sufficient to enable him to answer the statement concerning his letter claimed to have been sent from the penitentiary and, therefore, denies the fact; denies that the petitioner stated to the judge that he did not desire counsel appointed for him or that he was pleading guilty because he was guilty; alleges that at no time was petitioner informed, did he know or believe that he was entitled to the assistance of counsel for his defense, and that at no time did anyone ask him if he desired the assistance of counsel nor did anyone offer to procure such assistance for him; avers that he was without money to pay for counsel and believed he could not obtain the assistance of counsel without money to pay a lawyer; asserts that he attended school to the fifth grade and had had no further schooling or education, was entirely unversed in the law and unable and un-

qualified to represent or act for himself in a criminal proceeding; that at no time was he asked to waive his right to the assistance of counsel nor did he by word or act state or indicate that he waived, or intended to waive, that right; denies his guilt and denies that the evidence produced at trial showed his guilt.

Upon these pleadings the District Judge, after hearing argument, discharged the rule to show cause and dismissed the petition for the writ. The Circuit Court of Appeals affirmed.[1]

The petitioner contended in the Circuit Court of Appeals that the statute required the District Court to issue the writ and, upon his production in court, to hold a hearing on the issues made by the pleadings. The court found it unnecessary to pass on the contention, since it held "another manner of proceeding" (that here followed by the District Court) was permissible under our decisions. It approved the summary disposition of the case on the pleadings and affidavits submitted, as the petitioner had been afforded an opportunity to submit by affidavit whatever he deemed material. It thought the District Court was justified in disbelieving the petitioner's allegations and, on the basis of such disbelief, discharging the rule and denying the petition.

The case presents these questions: (1) Was the District Court, on the filing of the petition, bound forthwith to issue the writ and have the petitioner produced in answer to it? (2) If the procedure followed by the District Court was permissible, and the pleadings raised issues of fact, should those issues have been resolved by testimony rather than upon affidavits? (3) Did the pleadings raise any material issue of fact?

First. The statutes of the United States declare that the supreme court and the district courts shall have power to issue writs of *habeas corpus*;[2] that application for the writ shall be made to the court or justice or judge authorized to issue the same by complaint in writing, under oath, signed by the petitioner, setting forth the facts concerning his detention, in whose custody he is and by virtue of what claim or authority, if known.[3] The court or justice or judge "shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto."

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[1] 109 F. (2d) 436.

[2] R. S. 751, 28 U. S. C. 451.

[3] R. S. 754, 28 U. S. C. 454.

The writ shall be directed to the person in whose custody the petitioner is detained.[4] The person to whom the writ is directed must certify to the court or judge the true cause of detention and, at the same time he makes his return, bring the body of the party before the judge who granted the writ.[5] When the writ is returned a day is to be set for the hearing, not exceeding five days thereafter, unless the petitioner requests a longer time.[6] The petitioner may deny the facts set forth in the return or may allege any other material facts, under oath.[7] The court or judge "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."[8]

It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause ~~to which the relator may respond.~~ By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court[9] and by the lower courts.[10] It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.

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[4] R. S. 755, 28 U. S. C. 455.

[5] R. S. 757, 28 U. S. C. 457; R. S. 758, 28 U. S. C. 458.

[6] R. S. 759, 28 U S. C. 459.

[7] R. S. 760, 28 U. S. C. 460.

[8] R. S. 761, 28 U. S. C. 461.

[9] Ex parte Yarbrough, 110 U. S. 651, 653; Mooney *v.* Holohan, 294 U. S. 103, 111.

[10] Murdock *v.* Pollock, 229 Fed. 392.

Second. The District Court proceeded to adjudicate the petitioner's right to the writ upon the allegations of his petition and traverse and those of the return and accompanying affidavits. Thus the case was disposed of on *ex parte* affidavits and without the taking of testimony. The practice thus to dispose of applications for *habeas corpus* on matters of fact as well as of law has been followed in the Ninth and Tenth Circuits.[11]

In other circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received.[12] This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed "to determine the facts of the case, by hearing the testimony and arguments". It is not a question what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress. The question is what the statute requires.

As we said in *Johnson* v. *Zerbst,* 304 U. S. 458, 466, "Congress has expanded the rights of a petitioner for *habeas corpus* . . . There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* . . . it results that under the sections cited a prisoner in custody . . may have a judicial inquiry . . . into the very truth and substance of the causes of his detention. . . ." Such a judicial inquiry involves the reception of testimony, as the language of the statute shows.

The Government properly concedes that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner's right to have those issues heard and determined in the manner the statute prescribes.

Third. Did the pleadings present any material issue of fact? The Government says they did not. It urges that, construed most favor-

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[11] Harpin *v.* Johnston, 109 F. (2d) 434; Franzeen *v.* Johnston, 111 F. (2d) 817; Walker *v.* Chitty, 112 F. (2d) 79; Zahn *v.* Hudspeth, 102 F. (2d) 759; Nivens *v.* Hudspeth, 105 F. (2d) 756; McCoy *v.* Hudspeth, 106 F. (2d) 810; McDonald *v.* Hudspeth, 108 F. (2d) 943; Moore *v.* Hudspeth, 110 F. (2d) 386; Taylor *v.* Hudspeth, 113 F. (2d) 825.

[12] Cundiff *v.* Nicholson, 107 F. (2d) 162; Hurt *v.* Zerbst, 97 F. (2d) 519; Brown *v.* Zerbst, 99 F. (2d) 745; Mothershead *v.* King, 112 F. (2d) 1004; Sanders *v.* Allen, 100 F. (2d) 717; Clawans *v.* Rives, 104 F. (2d) 240; United States *v.* Hiatt, 33 F. Supp. 545.

ably to petitioner, the allegations of the petition and the traverse do not show that he was in apparent or actual need of counsel's aid; and do disclose that he voluntarily waived the right to counsel.

Without repeating the allegations of the petition and traverse, which have been summarized above, we think it clear that, taken together, they overcome the presumption of regularity which the record of the trial imports and that, if the facts alleged were established by testimony to the satisfaction of the judge, they would support a conclusion that the petitioner desired the aid of counsel, and so informed the District Attorney, was ignorant of his right to such aid, was not interrogated as to his desire or informed of his right, and did not knowingly waive that right, and that, by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel,[13] or if he was deceived or coerced by the prosecutor into entering a guilty plea,[14] he was deprived of a constitutional right. On a hearing he would have the burden of sustaining his allegations by a preponderance of evidence. It is true that they are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination *ore tenus* or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.

The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

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[13] Johnson *v.* Zerbst, 304 U. S. 458.

[14] Mooney *v.* Holohan, 294 U. S. 103.